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No. 08-506

In the Supreme Court of the United States

JANET SUE SHRINER,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Petition for a Writ of Certiorari
from the Supreme Court of the State of Minnesota

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Summary

Petitioner was involved in a two-car traffic accident that resulted in non-life-threatening injuries to the other driver. Petitioner drove away from the scene and police stopped her shortly thereafter. During the stop, police formed the belief that Petitioner was impaired by alcohol. Police then transported Petitioner to the hospital and directed medical staff to draw a blood sample from Petitioner without obtaining a warrant.

Petitioner stipulated that police had probable cause to believe evidence of impairment would be found as a result of testing her blood, but moved to suppress the test because police did not obtain Petitioner's consent to draw her blood or show that exigent circumstances justified taking the blood without a warrant. The district court found that there were no exigent circumstances and granted the motion to suppress. The Minnesota Court of Appeals affirmed.

In a 5-2 decision, the Minnesota Supreme Court reversed. The court held that in cases involving impaired driving, there is no need for the court to consider the "totality of the circumstances" in evaluating whether an exigency existed. Instead, the court concluded that the natural dissipation of alcohol in the blood creates a "single-factor exigent circumstance" that will always justify police taking a warrantless, nonconsensual blood sample.

Question

Does probable cause to believe alcohol is in a person's blood create a "single-factor exigent circumstance" that justifies a warrantless, nonconsensual seizure of that blood without violating the Fourth Amendment?

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Trial Court

The trial court's decision is not published. The trial court's order is reproduced in the Appendix at App. 63.

JURISDICTION

28 U.S.C. § 1257(a)

The Minnesota Supreme Court filed its opinion on May 30, 2008. Petitioner requested rehearing and that request was denied on July 14, 2008. The Minnesota Supreme Court entered its judgment on July 16, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the decision of a state's highest court that considers any title, right, privilege or immunity set up or claimed under the Constitution of the United States.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT IV, UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF FACTS

On May 8, 2006, at 9:26 p.m., Petitioner Janet Shriner was involved in a car accident when she drove her car into oncoming traffic on McAndrews Road in Burnsville, Minnesota. Petitioner struck another car, causing non-life-threatening injuries to the driver of that car. Petitioner then drove away from the scene of the accident until she was stopped by Burnsville Police Officer Maksim Yakovlev.

Yakovlev removed Petitioner from her car and determined that she was uninjured. During this initial encounter with Petitioner, Yakovlev observed that her eyes were bloodshot and "glazed over," that her clothes were "a little bit messy" and that she emitted a "strong odor of an alcoholic beverage." Having learned from his dispatcher that there were injuries involved in the accident, Yakovlev believed he had probable cause that Petitioner had committed the offense of Criminal Vehicular Operation in violation of Minn. Stat. § 609.21.

Yakovlev then transported Petitioner to the local hospital one-half mile away from the location of the traffic stop. At Yakovlev's direction, and without ever attempting to obtain her consent, a blood sample was taken from Petitioner at 10:11 p.m., approximately 30 minutes from the time Petitioner was last observed driving.

Like most other states, Minnesota has an "implied consent law" that, when invoked, allows a driver to either consent to or refuse to submit to an

alcohol concentration test.[1] Minnesota's implied consent law requires the officer to recite a standard advisory to the driver, give the driver an opportunity to consult with an attorney and then choose whether to submit to testing.[2]

Yakovlev testified that in cases involving Criminal Vehicular Operation it was the policy of the Burnsville Police Department to forgo the implied consent process and simply take a blood test without attempting to obtain the driver's consent. Yakovlev referred to the procedure of obtaining a test outside the implied consent law as a "*Schmerber* draw."[3]

Petitioner moved the district court to suppress the results of the blood alcohol concentration test on the ground that it was obtained from Petitioner in violation of her Fourth Amendment protection against unreasonable searches and seizures. Specifically, Petitioner argued that in the absence of a search warrant, the blood test evidence is inadmissible unless the state could prove that the evidence was obtained pursuant to a warrant exception. The state argued that the evidence was admissible under the "exigent circumstances" exception as articulated in this Court's decision in *Schmerber*.

Yakovlev testified that he had no official responsibilities regarding the accident outside of dealing with Petitioner's arrest and testing. He was

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[1] Minn. Stat. § 169A.50-.53 (2006).

[2] Minn. Stat. § 169A.51 (2006).

[3] Referring to this Court's decision in *Schmerber v. California*, 384 U.S. 757 (1966).

not needed at the scene to deal with traffic, to tend to the injured driver of the other vehicle or to conduct any other type of investigation. In addition, Petitioner was not injured, so the only procedure she underwent at the hospital was the withdrawal of her blood. Accordingly, Yakovlev had no concern that Petitioner would be taken away for any medical procedure that might sever his direct contact with Petitioner or delay the blood draw. In fact, immediately following the blood draw, Petitioner was transported by Yakovlev to the Burnsville Police Station for interrogation and later transported to the county jail. Yakovlev also testified that he believed Petitioner was extremely intoxicated, so he had no concern that she might "slip under the legal limit at any moment."

The district court found that the state had failed to prove there were exigent circumstances that justified the warrantless search and granted Petitioner's motion to suppress. In doing so, the district court found that the circumstances surrounding the blood draw in this case were substantially different than those in *Schmerber*, and that the state's assertion that *Schmerber* created a "*per se* exception" to the warrant requirement for cases involving impaired driving was incorrect.

After ordering the evidence of Petitioner's alcohol concentration suppressed, the district court dismissed the two counts of the seven-count complaint that required the state to prove Petitioner's alcohol concentration as an element of the offense. The state, rather than proceeding to

trial on the remaining five counts of the complaint, chose to appeal this pretrial decision.[4]

The Minnesota Court of Appeals affirmed the district court in a 2-1 decision.[5] The Minnesota Supreme Court accepted discretionary review and, in a 5-2 decision, reversed the court of appeals.[6]

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[4] Pretrial criminal appeals by the state are allowed in Minnesota if the state can show that the decision will have a critical impact on its case. Minn. R. Crim. P. 28.04.

[5] *State v. Shriner*, 739 N.W.2d 432 (Minn. Ct. App. 2007).

[6] *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008).

REASONS FOR GRANTING THE PETITION

I. The Minnesota Supreme Court has decided an important federal question in a way that is inconsistent with other decisions of this Court.

The Fourth Amendment to the United States Constitution provides that:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Searches conducted without a warrant are presumed to be unreasonable.[7] A warrantless search is always illegal unless it fits into one of the narrowly-drawn exceptions to the warrant requirement, of which there are several: consent,[8] search incident to a lawful arrest,[9] exigent circumstances with probable cause,[10] hot pursuit,[11]

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[7] *Preston v. United States*, 376 U.S. 364 (1964); *United States v. Jeffers*, 342 U.S. 48 (1951).

[8] *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

[9] *Ker v. California*, 374 U.S. 23 (1963); *Michigan v. DeFillippo*, 443 U.S. 31 (1979).

[10] *United States v. Chadwick*, 433 U.S. 1 (1977); *Schmerber*, 384 U.S. at 757; *South Dakota v. Neville*, 459 U.S. 553 (1983); *Illinois v. Batchelder*, 463 U.S. 1112 (1983).

[11] *Warden v. Hayden*, 387 U.S. 294 (1967).

stop and frisk[12] and inventory.[13] Beyond these, warrantless searches may be permissible at schools,[14] government offices[15] or of persons on probation.[16]

Other general propositions regarding searches are also worth noting, as they underscore the jealousy with which the constitutional right to privacy must be guarded.[17] All searches, even those with warrants, are to be limited narrowly, leaving nothing to the discretion of executing officers.[18] Warrants must be narrowly interpreted.[19] Exceptions to the warrant requirement are always to be narrowly construed.[20] Statutes cannot undermine the constitutional protection.[21] The Constitution cannot be subverted in the name of convenience or efficiency of law enforcement.[22] Even emergency justifications are narrowly circumscribed and strictly scrutinized.[23] The judgment of a neutral magistrate is always preferable to that of a police officer on the scene,[24] who is engaged in the "competitive enterprise of ferreting out crime."[25] The careful regulation of extra-judicial searches enhances the

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[12] *Terry v. Ohio*, 392 U.S. 1 (1968).
[13] *Cooper v. California*, 386 U.S. 58 (1967).
[14] *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).
[15] *O'Connor v. Ortega*, 480 U.S. 709 (1987).
[16] *Griffin v. Wisconsin*, 483 U.S. 868 (1987).
[17] *Arkansas v. Sanders*, 442 U.S. 753 (1979).
[18] *Stanford v. Texas*, 379 U.S. 476 (1965).
[19] *Bivens v. Six Agents*, 403 U.S. 388 (1971).
[20] *Ybarra v. Illinois*, 444 U.S. 85 (1979).
[21] *Torres v. Puerto Rico*, 442 U.S. 465 (1979).
[22] *Sanders*, 442 U.S. at 753.
[23] *Mincey v. Arizona*, 437 U.S. 385 (1978).
[24] *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979)
[25] *Johnson v. United States*, 333 U.S. 10 (1948).

"moral and educative force of the law" and improves law enforcement as well as protecting basic privacy rights.[26]

This Court has consistently held since 1966 that the collection and analysis of a biological specimen for purposes of scientific evaluation is a "search and seizure" entitled to protection under the Fourth Amendment.[27] The Court last considered the questions raised by a warrantless, non-consensual blood draw in a case involving impaired driving forty-two years ago in *Schmerber v. California*.[28]

In that case, Schmerber and his companion drove off the road and collided with a tree. Officers arrived on the scene and noted that Schmerber had an odor of liquor on his breath and that his eyes were bloodshot, watery and had a glassy appearance. Both Schmerber and his passenger were then transported to the hospital for medical treatment. When the investigating officer concluded his investigation at the scene, he went to the hospital, arriving within two hours of the initial call.

When the officer arrived, he advised Schmerber that he was under arrest and advised him of his right to counsel. Schmerber called an attorney and was apparently advised to refuse testing, which he did. The officer then directed the doctor in the emergency room to take a blood sample without Schmerber's consent and without a warrant.

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[26] *United States v. Caceres*, 440 U.S. 741 (1979).

[27] *See Schmerber*, 384 U.S. 757; *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989).

[28] 384 U.S. 757 (1966).

Schmerber's motion to suppress the evidence was denied.

In evaluating the legality of the officer's conduct, this Court first recognized that searches that probe beneath the surface of the body fall squarely within the protections of the Fourth Amendment.[29] As such, the Court went on to determine the legality of the warrantless search on the facts of the case and announced a landmark decision that has been mis-cited more often than perhaps any other case decided by this Court.

Although this Court went to great lengths to state that *Schmerber's* holding was limited to the "special facts" of the case before it,[30] the decision has spawned an attitude in both the courts and in law enforcement that a warrantless test can be legally taken in any case involving drinking and driving: what the officer in this case so casually referred to as taking a "*Schmerber*-draw." *Schmerber* has never stood for the proposition that probable cause to suspect impaired driving will always justify a warrantless blood draw, nor did this Court intend for it to do so.[31] But the Minnesota Supreme Court's decision in this case makes clear that it is being read to mean exactly that.

What *Schmerber* actually said was that:

> the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.

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[29] *Id.* at 769-70.
[30] *Id.* at 771.
[31] *Id.* at 770-71.

> Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.[32]

In other words, given the evanescent nature of alcohol in the blood and the time that had already passed, an exigency existed that, when coupled with probable cause, justified the warrantless search under those particular facts.

But those facts were not present in Petitioner's case. Here, the arresting officer had no duties outside of processing Petitioner. He was not assigned to investigate the accident, care for the injured or even manage traffic. His sole responsibility was to drive Petitioner the half-mile to the hospital. Once there, the officer did not even consider obtaining a warrant because he had already decided to obtain the blood sample by way of a "*Schmerber*-draw," despite the fact that hardly any time at all had elapsed since the accident.

This Court concluded the Schmerber case with this caution:

> We thus conclude that the present record shows no violation of petitioner's

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[32] *Id.* at 770-71.

> right under the Fourth and Fourteenth Amendments to be free from unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the State's minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.[33]

It is difficult to imagine a set of facts less "exigent" than those in this case. The decision to forgo a warrant here was not the product of a genuine belief that valuable evidence would be lost, but of an institutional indifference to the Fourth Amendment, citing this Court's decision as justification. Worse yet, the police have named this boundless extra-constitutional expedient after this Court's narrowly-crafted decision. The Court should grant certiorari if for no other reason then to put a stop to that.

But what is even worse, the Minnesota Supreme Court decided to lower the standard for warrantless searches at a time when technological advances strongly militate for exactly the opposite conclusion. At the time of *Schmerber*, this Court could not have imagined that within a generation every person would carry a wireless phone in his or

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[33] *Id.* at 772.

her pocket, that everyone's desk would have a computer connected to everyone else's computer via the internet or even that the contents of a piece of paper could be transmitted via facsimile over a telephone line. Courts have kept pace with these advancements in a number of different ways, including the advent of "oral warrants."

Minnesota has permitted the issuance of search warrants based on oral testimony since 1994.[34] The rules for oral search warrant applications provide that the entire process may be conducted by calling a judge by telephone, radio or any other similar means of communication.[35] In addition, any written material the judge and police officer wish to exchange may be transmitted by facsimile or any other "appropriate means," which would presumably include emails and attachments.[36]

The Minnesota Supreme Court briefly addressed the telephonic warrant issue and summarily dismissed it.[37] The court reasoned that:

> The officer facing the need for a telephonic warrant cannot be expected to know how much delay will be caused by following the procedures necessary to obtain such a warrant.[38] And during the time taken to obtain a telephonic warrant, it is undisputed that the

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[34] *See generally* Minn. R. Crim. P. 36.

[35] Minn. R. Crim. P. 36.01.

[36] *Id.*

[37] *Shriner*, 751 N.W.2d at 549.

[38] This is probably true if officers are encouraged by this decision never even to give the telephone warrant process a try.

> defendant's body is rapidly[39] metabolizing and dissipating the alcohol in the defendant's blood. We do not believe that the possibility of obtaining a telephonic warrant is sufficient to overcome the single-factor exigent circumstances of the rapid[40] dissipation of alcohol in the defendant's blood in this case.[41]

This observation misses the point completely. If an officer tries to obtain a warrant and fails to reach a judge, or the process proves to be too cumbersome or time consuming in a particular case, that fact can simply be added to the officer's calculation of whether to proceed without a warrant. Assuming the officer then goes forward with a warrantless blood draw, the fact that he or she tried to obtain a warrant is simply added to what is supposed to be the "totality of the circumstances" a court will consider in determining whether exigent circumstances existed that justified the search.

Undoubtedly, the Minnesota Supreme Court's decision in this case has its allure. It provides a clear and expeditious path for officers to obtain

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[39] The Minnesota Supreme Court decided to add the word "rapid" to every sentence where it discussed the dissipation of alcohol from the body, but never cited any authority as to why that word belongs in the lexicon. The rate of dissipation is, and always has been (even in 1966) 0.015 percent per hour. Hardly what one would call rapid. But even if that could somehow be considered "rapid," the court never even hinted at how long it believed it would have taken to involve a neutral magistrate.

[40] *Id.*

[41] Footnote omitted.

biological samples without having to engage in any excess thinking, and it protects the peaceful repose of those Minnesota judges who might otherwise be called upon to issue warrants in the middle of the night. But this Court has made very clear that the Constitution cannot be subverted in the name of convenience or efficiency of law enforcement.[42] And if it cannot be subverted on behalf of efficient law enforcement, it certainly should not be subverted in the name of judges getting an uninterrupted night of sleep.

In the end, to accomplish the goal it desired, the Minnesota Supreme Court had to invent the constitutional concept of the "single-factor exigency" to expand this Court's limited holding in *Schmerber*. If such a concept existed, this Court would not have needed to bother with its lengthy analysis in *Welch v. Wisconsin*.[43] In that case, the State argued that the threat to public safety, hot pursuit and the need to preserve evidence of the driver's alcohol concentration were sufficient reasons to set aside the warrant requirement.[44] This Court rejected the claim that even the combination of these factors was enough to create the exigent circumstances needed.[45]

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[42] "[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *Mincey*, 437 U.S. at 393 (internal citations omitted).

[43] 466 U.S. 740 (1984).

[44] *Id.* at 753.

[45] *Id.* at 754.

It is difficult to imagine how, when a combination of factors that included the need to preserve alcohol-concentration evidence was insufficient to constitute exigent circumstances, the Minnesota Supreme Court could conclude that "single-factor" was enough.

Over the course of the last forty-two years, courts and law enforcement have slowly expanded the limited holding in *Schmerber* to the point that it is now cited as justification for any warrantless blood draw in an impaired driving case.[46] Minnesota's latest interpretation, that *Schmerber* somehow created a "single-factor exigent circumstance," obviating the need to consider the totality of the circumstances, is just the latest affront. As this Court cautioned long ago:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of

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[46] *See generally* Section II, below.

> the citizen, and against any stealthy encroachments thereon.[47]

The Fourth Amendment right to be free from warrantless intrusions beneath the skin has been subjected to forty-two years of "slight deviations" and "stealthy encroachments." It is time for this Court to intervene to reaffirm the importance of the warrant requirement and reverse the trend of the States to bow to the convenience of law enforcement. For these reasons, Petitioner respectfully requests that the United States Supreme Court grant certiorari in this case, and will ultimately ask that the Court reverse this unprecedented and unjustified expansion of police authority as contrary to the Fourth Amendment.

II. The Minnesota Supreme Court has decided an important federal question in a way that conflicts with the decisions of other states.

As noted by the Minnesota Supreme Court, the federal question raised in this case has been resolved inconsistently by appellate courts around the country. Not only are the states' decisions inconsistent, they have actually arrived at *opposite* conclusions while passing on the exact same federal constitutional question.

The Minnesota Supreme Court cited one state (Utah) that has ruled that the *Schmerber* did not create a single-factor exception to the warrant

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[47] *Boyd v. United States*, 116 U.S. 616, 635 (1886).

requirement.[48] The Minnesota Supreme Court further noted that one state (Wisconsin) ruled that the evanescent nature of alcohol in the blood alone constituted an exigent circumstance justifying a warrantless search.[49] In addition to those cited by the court, at least six additional states[50] have held that the mere evanescent nature of alcohol does not create a *per se* exigency.[51] But at least two other states[52] have held that the presence of alcohol is the only factor needed to satisfy the exigent circumstances test.[53] With the states irreconcilably divided over such an important constitutional question, this Court should resolve the dispute.

As the stewards of the Fourth Amendment, this Court should be particularly concerned that other courts around the country are reaching opposite conclusions when interpreting the same opinions from this Court. Clearly, additional guidance is required. This case presents a perfect opportunity to lay this question to rest. No party here is claiming the existence of any fact other than the evanescent nature of alcohol as a justification for forgoing a warrant. The Court would have the

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[48] *State v. Rodriguez*, 156 P.3d 771 (Utah 2007).

[49] *State v. Bohling*, 494 N.W.2d 399 (Wis. 2003).

[50] Alaska, Arizona, Idaho, Indiana, Iowa, and Oregon.

[51] *State v. Blank*, 90 P.3d 156, 162 (Ak. 2004); *State v. Flannigan*, 978 P.2d 127, 131 (Ariz. Ct. App. 1998) *rev. denied* (Ariz. May 26, 1999); *State v. Curtis*, 680 P.2d 1383, 1389 (Idaho Ct. App. 1984); *Justice v. State*, 552 N.E.2d 844, 847 (Ind. Ct. App. 1990); *State v. Johnson*, 744 N.W.2d 340, 344 (Iowa 2008); *State v. Moylett*, 836 P.2d 1329, 1334 (Or. 1992).

[52] California and Tennessee.

[53] *People v. Thompson*, 135 P.3d 3, 11 (Cal. 2006) *pet. for cert. denied* (Oct. 16, 2006); *State v. Humphreys*, 70 S.W.3d 752 (Tenn. Ct. App. 2001).

opportunity to provide an answer that is obviously needed to ensure that the Constitution is being applied equally to every person in the United States.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and reverse the decision of the Minnesota Supreme Court.

Respectfully submitted,

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STATE OF MINNESOTA
IN SUPREME COURT
A07-181

Court of Appeals Dietzen, J.
Dissenting, Meyer and Anderson, Paul H., JJ.

State of Minnesota,
Appellant,

vs.

Janet Sue Shriner,
Respondent.

SYLLABUS

When law enforcement has probable cause to believe a defendant has committed the offense of criminal vehicular homicide or operation under Minn. Stat. § 609.21 (2006), it is important that the defendant's blood be tested within 2 hours of the accident causing injury to or the death of another. The rapid, natural dissipation of alcohol in the blood creates a single-factor exigent circumstance that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed criminal vehicular homicide or operation.

Reversed and remanded.

Heard, considered, and decided by the court en banc.

OPINION

DIETZEN, Justice.

Appellant State of Minnesota challenges a district court order granting the motion of respondent Janet Sue Shriner (Shriner) to suppress evidence of a warrantless blood draw obtained after she caused a car accident. The court of appeals affirmed, concluding that in order for a warrantless, nonconsensual blood draw to meet the requirements of the Fourth Amendment, there must be probable cause and exigent circumstances as demonstrated by an officer's evaluation of the totality of the circumstances. *State v. Shriner*, 739 N.W.2d 432, 440 (Minn. App. 2007). The issue on this appeal is whether the evanescent nature of alcohol in the blood constitutes "single-factor" exigent circumstances sufficient to justify a warrantless blood draw when there is probable cause to arrest a suspect for operating a vehicle in violation of Minn. Stat. § 609.21 (2006). We granted review and now reverse and remand to the district court for proceedings consistent with this opinion.

On May 8, 2006, at approximately 9:26 p.m., Shriner was involved in a car accident when she drove her car into oncoming traffic on McAndrews Road in Burnsville, Minnesota, hit another car in a head-on collision, and continued driving until she was forced to stop by a Burnsville squad car. The squad car bumped Shriner's vehicle, causing it to spin and go onto a cement median. Burnsville police requested that Shriner voluntarily leave her vehicle, but she refused. Police then forcibly removed her from the car after breaking a window and opening the door.

At that point, police observed that Shriner was not injured and that she smelled of alcohol, had blood-shot eyes that were glazed over, and was unable to stand without assistance. An officer then placed Shriner under arrest and put her in the back seat of his squad car. Shortly thereafter, he learned from other officers at the scene of the accident that the driver of the other vehicle had sustained head and leg injuries. The officer then took Shriner to a nearby hospital for the purpose of obtaining a blood sample. The officer did not invoke the implied-consent procedure or read the implied-consent advisory.

Medical personnel drew a blood sample from Shriner approximately 45 minutes after the accident. The State represented that subsequent analysis of Shriner's blood sample indicated her blood-alcohol content was 0.33.[1] Before directing medical personnel to take the blood sample, the police did not obtain, or attempt to obtain, a search warrant.

The State charged Shriner with seven criminal counts, including first-degree driving while impaired and criminal vehicular operation resulting in bodily harm. Before trial, Shriner moved to have the results of the blood draw suppressed. At the omnibus hearing, Shriner conceded that there was probable cause to believe that she violated the criminal vehicular operation statute, but she argued that the State did not show exigent circumstances that would justify a warrantless, nonconsensual blood draw. The

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[1] There is nothing in the record regarding the analysis of Shriner's blood sample or her blood-alcohol content. Shriner, however, does not dispute the State's representation.

officer who transported Shriner to the hospital for the blood draw admitted that he was not worried that Shriner was "about to slip under the legal limit."

Following the hearing, the district court granted Shriner's motion to suppress, finding that there was probable cause to believe "that a blood alcohol test would result in the discovery of evidence relevant to prosecuting [Shriner] for a violation of Minn. Stat. § 609.21," but that the State failed to present evidence of exigent circumstances or that an emergency existed justifying a warrantless blood draw. Due to a lack of probable cause to support the charges, the court dismissed the counts of first-degree driving while impaired and criminal vehicular operation resulting in bodily harm.

The court of appeals affirmed the district court in a published 2-1 decision.[2] *State v. Shriner*, 739 N.W.2d 432, 440 (Minn. App. 2007). The majority concluded that the "Fourth Amendment of the United States Constitution precludes using the results of a warrantless, nonconsensual blood draw in a criminal prosecution unless law enforcement has probable cause to believe criminal conduct has occurred and there are exigent circumstances in addition to

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[2] The court of appeals determined that the suppression of the blood-alcohol content evidence would have a critical impact on the State's case. *State v. Shriner*, 739 N.W.2d 432, 435 (Minn. App. 2007). That issue is not a part of this appeal.

evidence of alcohol consumption." *Id.* The majority applied a "totality-of-the-circumstances" test to determine whether exigent circumstances existed to necessitate conducting the blood draw without a warrant. *Id* at 438. We granted the State's petition for further review.

I.

The State contends that the district court erred in suppressing the results of the blood draw. "When reviewing a pretrial order on a motion to suppress evidence, we may independently review the facts and determine whether, as a matter of law, the district court erred in suppressing or not suppressing the evidence." *State v. Askerooth,* 681 N.W.2d 353, 359 (Minn. 2004).

> The Fourth Amendment to the United States Constitution provides:
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> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, section 10 of the Minnesota Constitution contains a parallel provision.

Taking a person's blood is considered a search under the Fourth Amendment. *Schmerber v. California,* 384 U.S. 757, 767 (1966). It is a basic principle of constitutional law that warrantless searches are presumptively unreasonable. *State v. Licari,* 659 N.W.2d 243, 250 (Minn. 2003). "Nevertheless, because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart,* 547 U.S. 398, 403 (2006).

One such exception is exigent circumstances. "'[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.'" *Brigham City,* 547 U.S. at 403 (alteration in original) (quoting *Mincey v. Arizona,* 437 U.S. 385, 393-94 (1978)). "The U.S. Supreme Court has not adopted a definite test for determining when exigent circumstances exist." *State v. Gray,* 456 N.W.2d 251, 256 (Minn. 1990). The Court, however, has recognized. such emergency conditions exist in a few situations, including the hot pursuit of a fleeing felon, the destruction of evidence, an ongoing fire, and the rendering of emergency aid. *Welsh v. Wisconsin,* 466 U.S. 740, 750 (1984); *Gray,* 456 N.W.2d at 256.

Initially, when this court discussed whether exigent circumstances existed to justify a warrantless search, we looked to the totality of circumstances and considered six factors that were articulated by the United States Court of Appeals for the D.C. Circuit in the case of *Dorman v. United States,* 435 F.2d 385 (1970).[3] *See State v. Lasley,* 306 Minn. 224, 232, 236

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[3] The six factors we adopted in weighing whether the "totality of the circumstances" create exigent circumstances are: (1) "whether a grave or violent offense is involved"; (2) "whether the suspect is reasonably believed to be armed"; (3) "whether there is strong probable cause connecting the suspect to the offense"; (4) "whether police have strong reason to believe the suspect is on the premises"; (5) "whether it is likely the suspect will escape if not swiftly apprehended"; and (6) "whether peaceable entry was made." *State v. Hummel,* 483 N.W.2d 68, 72-73 (Minn. 1992) (quoting *Gray,* 456 N.W.2d at 256, and citing *Dorman,* 435 F.2d at 392-93).

N.W.2d 604, 609 (1975) (citing the six factors outlined in *Dorman* for determining whether "exigent circumstances" justified entering a suspect's home without a warrant). Determining whether exigent circumstances exist under the "totality of the circumstances" is a "flexible approach that encompasses all relevant circumstances." *State v. Hummel,* 483 N.W.2d 68, 73 (Minn. 1992) (internal quotation marks omitted).

In *State v. Gray,* we refined our jurisprudence regarding exigent circumstances. We concluded "[t]here generally are two types of tests for exigent circumstances: (1) single factor exigent circumstances, and (2) in the absence of any of these factors, a 'totality of the circumstances' test." 456 N.W.2d 251, 256 (Minn. 1990). We have described the test for single-factor exigent circumstances as one in which "the existence of *one fact alone* creates exigent circumstances." *In re Welfare of D.A.G.,* 484 N.W.2d 787, 791 (Minn. 1992) (emphasis added). It is only when "none of the single factor exigent circumstances is clearly implicated" that we apply a "totality of the circumstances" test to determine whether exigent circumstances are present. *Gray,* 456 N.W.2d at 256; *see also In re Welfare of B.R.K.,* 658 N.W.2d 565, 579 (Minn. 2003) ("When a 'single factor' exigent circumstance does not exist, we apply a totality of the circumstances test"); D.A.G., 484 N.W.2d at 791. Thus, this court has acknowledged for nearly 20 years that the existence 6f one fact alone can create exigent circumstances that justify a warrantless search, and that in such a situation, we do not rely upon the totality of the circumstances in considering whether a warrantless search was proper.

We have recognized single-factor exigent circumstances justifying a warrantless search in cases involving hot pursuit of a fleeing felon, imminent destruction or removal of evidence, protection of human life, likely escape of the suspect, and fire. *Gray*, 456 N.W.2d at 256. More importantly, we have stated that a warrantless search is permissible "when the delay necessary to obtain a warrant might result in the loss or destruction of the evidence." *State v. Richards*, 552 N.W.2d 197, 203 (Minn. 1996). Whether exigent circumstances exist is an objective determination, and the individual officer's subjective state of mind is irrelevant. *Brigham City*, 547 U.S. at 404-05 (holding that whether exigent circumstances existed because the police needed to render emergency aid was an objective determination where the subjective motivation of the officer was irrelevant); *cf. State v. Olson*, 482 N.W.2d 212, 214 (Minn. 1992) (holding that "if there is an objective legal basis" for a search, it will be upheld, "even if the officer * * * conducting the search based his or her action on the wrong ground or had an improper motive"). It is the State's burden to provide facts to support its theory that the evidence "the officer thought was present" would be destroyed or disappear. *See D.A.G.*, 484 N.W.2d at 791 (rejecting State's contention that warrantless entry into home was justified by the imminent destruction of evidence because the State had "not advanced a theory" and had "failed to provide facts" explaining how the drugs the officers saw "would have suddenly disappeared").

A. *Single factor exigent circumstances*

The State argues that when police have probable cause to believe that a defendant committed criminal vehicular operation resulting in homicide or injury,[4] they may take a blood draw without a warrant because the evanescent nature of alcohol in the blood creates a single-factor exigent circumstance. The single-factor exigent circumstance the State relies on is the imminent destruction of evidence.

In the landmark case of *Schmerber v. California,* 384 U.S. 757, 758-59 (1966), the United States Supreme Court considered whether the taking of a blood sample from a nonconsenting driver violated his right under the Fourth Amendment to be free of unreasonable searches and seizures. Schmerber, who was the driver of a car involved in an accident, was suspected by an investigating officer at the accident scene to be under the influence of alcohol. *Id.* at 768-69. At the hospital, the officer placed Schmerber under arrest and, without first obtaining a warrant or Schmerber's consent, directed hospital staff to take a blood sample. *Id* at 758-59, 768. The Supreme Court held that the blood tests were admissible, concluding that probable cause

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[4] The criminal vehicular operation statute prohibits a person from, among other things, causing the death or injury of another person as a result of operating a motor vehicle "while having an alcohol concentration of 0.08 or more," "while having an alcohol concentration of 0.08 or more, as measured within two hours of the time of driving," or in a negligent manner while under the influence of alcohol. Minn. Stat. § 609.21, subds. 1-2b (2006).

existed to arrest the driver, *id.* at 768, and that

> [t]he officer in the present case * * * might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

Id at 770-71 (citation and quotation marks omitted). It is unclear whether the Supreme Court justified the warrantless search because of the "threatened destruction of evidence" caused by the rapid dissipation of alcohol in the defendant's bloodstream or because the search was a reasonable search incident to a lawful arrest.

Then in the case of *Cupp v. Murphy,* 412 U.S. 291, 292-93 (1973), the Supreme Court considered whether taking scrapings from the fingernails of a defendant, who the police suspected had murdered his wife, violated the Fourth Amendment when the

defendant had not been arrested. During an interview with the defendant, officers noticed a dark substance on the defendant's finger that they believed to be blood. *Id.* at 292. The defendant refused a request for a sample of his fingernail scrapings and immediately placed his hands behind his back and appeared to rub them together. *Id.* at 296. He then placed his hands in his pockets, at which point the officers heard "a metallic sound, such as keys or change rattling." *Id.* (internal quotation marks omitted). The officers detained the defendant and, without first obtaining a warrant, took a sample from under his fingernails. *Id.* at 292-93. This sample contained skin and blood cells from the victim. *Id.* at 292. Relying in part on *Schmerber,* the Court upheld the search, concluding that the police had probable cause to arrest the suspect for murder, *id.* at 293, and were "justified" in subjecting him "to the very limited search *necessary to preserve the highly evanescent evidence* they found under his fingernails." *Id.* at 296 (emphasis added).

Subsequent cases of the Supreme Court have recognized *Schmerber* as a case in which exigent circumstances justified a warrantless search. *See Winston v. Lee,* 470 U.S. 753, 759 (1985) (discussing *Schmerber* and explaining that "[b]ecause the case fell within the exigent-circumstances exception to the warrant requirement, no warrant was necessary"); *Welsh,* 466 U.S. at 750 (discussing examples of exigent circumstances the Supreme Court has recognized and citing *Schmerber* as one such example, based on the "destruction of evidence").

This court has also concluded that a warrantless blood draw is justified if supported by

probable cause and exigent circumstances. *State v. Aguirre,* 295 N.W.2d 79, 81 (Minn. 1980). Further, we have upheld warrantless blood draws in cases involving the offense of criminal vehicular homicide when exigent circumstances existed that required immediate action to prevent the imminent destruction of evidence. *See id.* at 82; *State v. Oevering,* 268 N.W.2d 68, 74 (Minn. 1978).

In *Oevering,* we rejected a Fourth Amendment challenge to the admission of blood-alcohol content evidence when a blood sample was taken without the defendant's consent or a warrant and when the officer had probable cause to believe that the defendant, while under the influence of alcohol, had caused a traffic accident resulting in a fatality. 268 N.W.2d at 69, 74. Applying the rule articulated by the Supreme Court in *Cupp,* we stated that the blood draw could be conducted without a warrant if, among other things, "the evidence sought will be forever lost absent the search." *Id* at 73. We stated that "it is beyond question that with the passage of time, normal physiological functions eliminate the alcohol content of an inebriate's blood." *Id* at 74. We concluded that, due to the passage of time after the accident, immediate action was required to avoid the loss of blood-alcohol content evidence. *Id.*

Two years later in *Aguirre,* we held that a nonconsensual, warrantless removal of a suspect's blood did not violate the Fourth Amendment when an officer "had probable cause to believe that defendant driver was not only intoxicated but had just committed the felony offense of criminal negligence resulting in death." 295 N.W.2d at 82 (citing Minn. Stat. § 609.21 (1978)). We reasoned that the officer

was confronted with a situation in which "he knew that it was essential that he obtain the blood sample without delay and without regard to whether defendant would consent to the removal of a blood sample." *Id.*

We did not use the terminology "single-factor exigent circumstances" or "totality of the circumstances" in either *Oevering* or *Aguirre*. But we had not adopted the two separate tests for exigent circumstances until after these cases were decided. *See Gray*, 456 N.W.2d at 256 (first recognizing in 1990 the distinction between single-factor exigent circumstances and the totality of the circumstances test for determining exigent circumstances). Instead, *Oevering* and *Aguirre* rested on the determination that "the evidence sought will be forever lost absent the search" because "with the passage of time, normal physiological functions eliminate the alcohol content of an inebriate's blood." *Oevering*, 268 N.W.2d at 73-74; *see also Aguirre*, 295 N.W.2d at 82 (finding it was "essential" the officer obtain the blood sample without regard to whether the defendant would consent to the blood draw). But our analysis in *Oevering* and *Aguirre* still focused on the imminent destruction of evidence – the rapid dissipation of alcohol content in the defendant's bloodstream was the dispositive factor on which we based our conclusion that evidence in those cases would be lost without an immediate search. Consequently, our holdings in *Oevering* and *Aguirre* support the conclusion that the rapid dissipation of alcohol in the bloodstream may be a single-factor exigent circumstance based on the imminent destruction of evidence.

In *State v. Paul*, this court held that the police, who were in hot pursuit of a suspected DWI offender, could make a warrantless entry into the defendant's home in order to effectuate arrest. 548 N.W.2d 260, 265 (Minn. 1996). We concluded, among other things, that the rapid dissipation of alcohol in the bloodstream constitutes a single-factor exigent circumstances exception to the warrant requirement. Specifically, we found that "the need to preserve evidence of [the defendant's] blood alcohol level is a compelling exigent circumstance under the 'destruction of evidence' exception to the warrant requirement first recognized [in *Schmerber*]." *Id* at 266. We further noted, in summarizing *Schmerber*, that the warrantless removal of blood is "necessary to prevent the destruction of the most probative evidence of [a defendant's] offense" because "'the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system.'"[5] *Id.* at 267 (quoting

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[5] The dissent asserts that we "did not mention a single-factor exigent circumstance" in *Paul*. But in *Paul* we expressly referred to and analyzed the destruction of evidence exception to the warrant requirement, which is a single-factor exigent circumstance. *See* 548 N.W.2d at 266-67. Thus, the dissent's argument that we "relied on the totality of the circumstances to support the conclusion that there was no time to get a warrant" is contrary to the record in *Paul*. Specifically, the fact that we stated the defendant's blood-alcohol level "might have dissipated while a warrant was being obtained," as opposed to "would have" dissipated, does not indicate that we based our determination that evidence would have been lost while a warrant was obtained on anything other than the fact that the percentage of alcohol in the body is reduced shortly after drinking stops because of the body's natural processes. *See id.* at 267. We agree that *Paul* also addressed another

Schmerber, 384 U.S. at 770); *see also State v. Heaney*, 689 N.W.2d 168, 173 n.2 (Minn. 2004) (describing in dicta that *Schmerber* and *Oevering*, "due to the natural exigency involved in obtaining blood-alcohol evidence, recognize the power of a peace officer to compel a blood sample from a driver where there is probable cause to believe the driver has violated a criminal vehicular operation law"); *State v. Speak*, 339 N.W.2d 741, 745 (Minn. 1983) (holding "[e]xigent circumstances were clearly present" that justified warrantless, nonconsensual breathalyzer test where defendant was suspected of fatally hitting pedestrian while driving under the influence of alcohol).

Consequently, we conclude that when officers have probable cause to believe a defendant has committed the offense of criminal vehicular homicide or operation under Minn. Stat. § 609.21, it is important that the defendant's blood be tested within 2 hours of the accident causing injury to or the death of another.[6] With every passing minute, the most

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single-factor exigent circumstance, the hot pursuit of a fleeing felon. But this court's consideration of the imminent destruction of evidence was limited to consideration of a single factor – the rapid dissipation of alcohol in the defendant's bloodstream. *See id.* at 266-67. Thus, the court relied only on the rapid dissipation of alcohol to support its conclusion that there was no time to get a warrant based on the imminent destruction of evidence.

[6] The criminal vehicular homicide and operation statute prohibits a person from, among other things, causing bodily harm to another person as a result of operating a motor vehicle "while having an alcohol concentration of 0.08 or more, as measured within two hours of the time of driving." Minn. Stat. § 609.21, subd. 2b.

probative evidence of this crime is subjected to destruction by the body's natural processes. The rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed criminal vehicular operation.[7]

B. *Totality of the circumstances*

Shriner argues that this court should look at the totality of the circumstances to determine whether exigent circumstances exist to support a warrantless blood draw. Shriner contends that the holding of *Schmerber* requires this court to look at more than the evanescent nature of blood-alcohol content in determining whether exigent circumstances exist that would justify a warrantless blood draw. Shriner relies heavily on *State v. Rodriguez,* 156 P.3d 771 (Utah 2007), to support her argument. There the Utah Supreme Court concluded that *Schmerber* did not create a single-factor exception to the warrant requirement, that the availability of telephonic warrants cuts against adopting a single-factor exigency exception, and that a single-factor exigency exception would deter the pursuit of progressive approaches to warrant acquisition. *Id.* at 776, 778-79.

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[7] We express no opinion on whether the evanescent nature of blood-alcohol content is sufficient, in and of itself, to create single-factor exigent circumstances that would justify the police taking a warrantless blood draw when they have probable cause to believe that a defendant has committed any other crime where blood-alcohol content would be highly probative evidence.

We disagree. We have concluded in previous cases that there are two separate tests for exigent circumstances, and that if one factor creates exigent circumstances, we do not review other factors under a totality of the circumstances test to determine whether exigent circumstances exist. B.R.K., 658 N.W.2d at 579; D.A.G., 484 N.W.2d at 791; *Gray*, 456 N.W.2d at 256. In *D.A.G.* we stated that the existence of "one fact alone" may create exigent circumstances under the single-factor test. 484 N.W.2d at 791. It is undisputed that as a result of the body's physiological processes, the blood-alcohol content in a defendant's blood dissipates with the passage of every minute. Thus, the rapid dissipation of blood-alcohol content caused by the body's natural processes is a single factor that creates the exigent circumstances in the case of criminal vehicular operation to justify a warrantless blood draw.[8]

Schmerber does not prohibit our conclusion that the rapid dissipation of alcohol in the bloodstream can create a single-factor exigent circumstance.[9] First, the Supreme Court has stated

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[8] Therefore, we reject the dissent's conclusion that "the totality of the circumstances" must be reviewed in this case and that "when a police officer has probable cause to believe that a suspect has committed criminal vehicular operation, a blood sample may be taken without the suspect's consent if the officer has a reasonable belief that the delay necessary to obtain a warrant, under the circumstances, threatens the destruction of evidence."

[9] The dissent contends that the holding of *Schmerber* compels the conclusion that a totality of circumstances test must be employed on a case-by-case basis to determine whether a warrantless blood draw is reasonable when the police suspect a person of driving while under the influence of alcohol. The

in subsequent decisions that its holding in *Schmerber* justifies a warrantless blood draw based on the imminent destruction of alcohol caused by the natural processes of the body. In *Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 609, 624 (1989), the Supreme Court found federal regulations that required toxicological testing of the blood or urine of all railroad employees directly involved in any train accident that resulted in a reportable injury or damage to railroad property of $500,000 or more did not violate the Fourth Amendment and that a warrant was not a prerequisite to such searches of railroad employees. The Court cited *Schmerber,* 384 U.S. at 770-71, to support the conclusion that the purposes behind requiring post-accident blood testing of railroad employees would be frustrated by requiring a warrant because "alcohol and other drugs are eliminated from the bloodstream at a constant rate, and blood and breath samples taken to measure whether these substances were in the bloodstream

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dissent notes that the judgment of *Schmerber* was limited "only on the facts of the present record" and that the Supreme Court stated, "[t]hat we today hold that the Constitution does not forbid the State's minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." 384 U.S. at 774. This language, however, is properly analyzed as indicating that *Schmerber* should not be viewed as authorizing the police to take warrantless blood draws in circumstances other than when they suspect a person of drunk driving, as opposed to compelling the conclusion that the Supreme Court held in *Schmerber* that a "totality of the circumstances" approach must be used in determining whether the police can take a warrantless blood draw when they have probable cause to believe someone has engaged in drunken driving.

when [an accident] occurred must be obtained as soon as possible." *Skinner,* 489 U.S. at 623 (citation omitted). After noting that some drugs are still detectable in the body "for longer periods of time," the Court concluded that "the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence."[10] *Id.; see also South Dakota v. Neville,* 459 U.S. 553, 559 (1983) (indicating that "*Schmerber* * * * clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood-alcohol test").

Further, the view urged by Shriner, which was also adopted by the court of appeals in its decision, is the minority view of *Schmerber.* Other courts have interpreted *Schmerber* as concluding that the naturally rapid dissipation of alcohol in the bloodstream creates an emergency that justifies a

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[10] The dissent contends that our reliance on *Skinner* is misplaced, arguing that the Supreme Court in *Skinner* cited factors other than the rapid dissipation of alcohol in the bloodstream to uphold the regulations at issue, and therefore examined "the totality of the particular circumstances" and not a single factor. But in *Skinner,* the Supreme Court did not mention the other factors identified by the dissent, such as the narrowness of the regulations at issue or that a private company would set the testing process in motion, in its analysis of *Schmerber* or in its discussion of whether blood-alcohol content evidence would be lost in the time it takes to get a warrant. *See Skinner,* 489 U.S. at 623. Thus, these additional factors do not indicate that the Supreme Court relied on anything other than the rapid dissipation of alcohol in the bloodstream to support its conclusion that blood-alcohol content evidence would be lost in the time it takes to get a warrant.

warrantless blood draw.[11]

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[11] *See United States v. Eagle*, 498 F.3d 885, 892 (8th Cir. 2007) (upholding warrantless blood draw and quoting *Schmerber*, 384 U.S. at 770-71, as support for the conclusion that "[e]xigent circumstances exist when there is a risk of destruction of evidence, including a risk that a defendant's blood-alcohol content will dissipate because `the body functions to eliminate [alcohol] from the system' " (second alteration in original)); *United States v. Reid*, 929 F.2d 990, 993-94 (4th Cir. 1991) (relying on *Schmerber*, 384 U.S. at 770-71, and *Skinner*, 489 U.S. at 623, for the proposition that warrants are not required for police to administer breathalyzer tests because, due to the constant rate at which alcohol is eliminated from the bloodstream, "[t]ime is what is lacking in these circumstances"); *State v. Cocio*, 709 P.2d 1336, 1344-45 (Ariz. 1985) (citing *Schmerber*, 384 U.S. at 770, to support conclusion that warrantless blood sample was taken based on exigent circumstances due to the imminent destruction of evidence and indicating that dissipation of alcohol in the blood presents "even more compelling [exigency] than *Cupp* since alcohol in a suspect's blood is certain to disappear while the physical evidence on defendant in *Cupp* was only very likely to disappear while a search warrant was obtained"); *State v. Entrekin*, 47 P.3d 336, 348 (Haw. 2002) (quoting *Schmerber*, 384 U.S. at 770, to support conclusion that under state constitution "exigent circumstances were clearly present" because "[i]t is undisputed that 'the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system' "); *State v. Woolery*, 775 P.2d 1210, 1212 (Idaho 1989) ("In the instant situation [where a warrantless, nonconsensual blood draw is sought by police], the destruction of the evidence by metabolism of alcohol in the blood provides an *inherent exigency* which justifies the warrantless search." (emphasis added)); *State v. Baker*, 502 A.2d 489, 493 (Me. 1985) (indicating that "[t]he bodily process that eliminates alcohol * * * provides exigent circumstances obviating the need to obtain a warrant prior to administering a blood test" without any evaluation of the time needed to obtain a

When faced with the same issue presented here, the Wisconsin Supreme Court in *State v. Bohling* determined that the evanescent nature of alcohol in the blood was sufficient to constitute exigent circumstances justifying a warrantless search. 494 N.W.2d 399, 406 (Wis. 1993). The Wisconsin Supreme Court explained that

> *Schmerber* can be read in either of two ways: (a) that the rapid dissipation of alcohol in the bloodstream alone constitutes a sufficient exigency for a warrantless blood draw to obtain evidence of intoxication following a lawful arrest for a drunk driving related violation or crime * * *; or (b) that the rapid dissipation of alcohol in the bloodstream, coupled with an accident, hospitalization, and the lapse of two hours until arrest, constitute exigent circumstances for such a blood draw.

Id. at 402. The *Bohling* court concluded that the first of these readings of *Schmerber* was the more appropriate. *Id.*

The *Bohling* court based its conclusion on "(1) a logical reading of *Schmerber,* (2) the Supreme Court's decision in *Skinner* * * *, (3) interpretations of *Schmerber* by other courts, and (4) an examination of [the State's] interest in enforcing its drunk driving laws." *Id.* Specifically related to the first reason, the Wisconsin Supreme Court noted that "[a] logical analysis of the *Schmerber* decision indicates that the

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warrant or the fact that police arrived on the scene soon after the accident).

exigency of the situation presented was caused solely by the fact that the amount of alcohol in a person's bloodstream diminishes over time." *Id.* While the Supreme Court noted other facts in *Schmerber,* such as the fact that an accident occurred and that the defendant was taken to the hospital, these other facts "did not increase the risk that evidence of intoxication would be lost." *Id.* We agree with the Wisconsin Supreme Court's analysis of *Schmerber.*

The dissent argues we have abandoned the requirement that in invoking "the imminent destruction or removal of evidence" as a single-factor exigency, the State must explain why the peace officer could reasonably believe that evidence would be destroyed. Because we have not abandoned this requirement, the dissent's warning rings hollow. We are simply recognizing that when the police have probable cause to suspect a defendant committed criminal vehicular operation, it is objectively reasonable to conclude that the alcohol content in a defendant's blood dissipates with the passage of time due to the human body's natural, physiological processes. Our existing jurisprudence has already recognized this physiological process. Today we conclude that in the case of criminal vehicular operation the undisputed rapid dissipation of alcohol in the defendant's blood creates a single-factor exigent circumstance.

The dissent also argues that "it is the length of the delay" in obtaining a warrant "that determines whether the evidence will disappear." This argument rests on the contention that exigent circumstances are not present if it is possible to get a warrant before all the evidence is destroyed. But our existing

jurisprudence has recognized that a warrantless search is justified based on the imminent destruction of evidence when there is the potential loss of evidence during the delay necessary to obtain a warrant. *See Richards,* 552 N.W.2d at 203. Specifically, when the police have probable cause to believe a person has committed the serious crime of criminal vehicular operation, there is the potential loss of all blood-alcohol content evidence, and the ongoing, actual loss of such evidence with every passing minute from the time the accident occurred until the blood draw is taken. Because it is undisputed that this loss of the most probative evidence of criminal vehicular operation occurs during the time it takes to obtain a warrant, exigent circumstances are present based on the imminent destruction of evidence.

Further, requiring law enforcement to consider other factors places an unreasonable burden on law enforcement. For instance, though the officer may be familiar with the area in which the accident occurred, the officer has no control over how long it would take to travel to a judge or the judge's availability. The officer also may not know the time of the suspect's last drink, the amount of alcohol consumed, or the rate at which the suspect will metabolize alcohol. Finally, an officer cannot know how long it will take to obtain the blood sample once the suspect is brought to the hospital.[12] Under a totality of the circumstances test, an officer would be called upon to

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[12] We note that under the facts of this case, even though Shriner was arrested approximately half a mile from a hospital, it still took 45 minutes to obtain her blood sample.

speculate on each of these considerations and predict how long the most probative evidence of the defendant's blood-alcohol level would continue to exist before a blood sample was no longer reliable. Shriner also contends that police may obtain telephonic warrants quickly and, therefore, the police can easily obtain the relevant evidence they need with a warrant. Put another way, Shriner contends that the use of telephonic warrants makes any exigency disappear because the police will be able to obtain a blood sample well before the evidence is entirely gone. But the officer facing the need for a telephonic warrant cannot be expected to know how much delay will be caused by following the procedures necessary to obtain such a warrant.[13] And during the time taken to obtain a telephonic warrant, it is undisputed that the defendant's body is rapidly metabolizing and dissipating the alcohol in the defendant's blood. We do not believe that the possibility of obtaining a telephonic warrant is sufficient to overcome the single-factor exigent circumstances of the rapid dissipation of alcohol in the defendant's blood in this case. Shriner also raises the possibility that a blood draw may be taken hours after the accident and that qualified scientists can extrapolate the results back to the time of the accident. But respondent presents no evidence to support this contention and, therefore, we decline to address it.

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[13] A telephonic warrant does not eliminate the need for documentation. A duplicate original warrant must be prepared and read to the judge. Minn. R. Crim. P. 36.03.

II.

We hold that when law enforcement has probable cause to believe a defendant has committed the offense of criminal vehicular homicide or operation under Minn. Stat. § 609.21 (2006), it is important that the defendant's blood be tested within 2 hours of the accident causing injury to or the death of another. The rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed criminal vehicular homicide or operation.

Reversed and remanded.

DISSENT

MEYER, Justice (dissenting).

I respectfully dissent. The majority today has created a new rule of law that erodes the right of citizens in Minnesota to be secure from unreasonable searches and seizures under the United States and Minnesota Constitutions. I would proceed with a more cautious approach, apply our long-standing rule of law that a search and seizure conducted without a warrant is per se unreasonable, and hold that when a police officer has probable cause to believe that a suspect has committed criminal vehicular operation, a blood sample may be taken without the suspect's consent if the officer has a reasonable belief that the delay necessary to obtain a warrant, under the circumstances, threatens the destruction of evidence.

The charges in this case stem from an incident on May 8, 2006, at approximately 9:26 p.m., when the complaint alleges respondent Janet Sue Shriner was involved in an accident in the area of McAndrews Road and 141st Street in Burnsville, Minnesota. The complaint alleges that Shriner drove into oncoming traffic, hit another car head-on, and then continued driving, at times on the sidewalk. The driver of the other car was taken to the hospital with head and leg injuries.

Burnsville police were dispatched after the accident to find respondent. Respondent was finally stopped when a police car bumped her car and caused it to spin and go up onto a cement median. Respondent refused to get out of her car, and the police forcibly removed her from her car after breaking a window and opening the door. The police observed that respondent had bloodshot, glazed-over

eyes, smelled of alcohol, and could not stand on her own. Respondent did not appear to be injured.

Respondent was arrested. She was then taken to a nearby hospital where her blood was drawn. The police did not ask for respondent's consent to draw blood, did not give respondent an implied-consent advisory before ordering her blood drawn, and did not obtain a search warrant for the blood draw. The blood draw occurred approximately 45 minutes after the accident. Subsequent analysis of respondent's blood showed a blood alcohol content of 0.33.

Appellant State of Minnesota charged respondent with: (1) two alternative counts of first-degree driving while impaired, in violation of Minn. Stat. §§ 169A.20, subds. 1(1) and 1(5) (2006), and 169A.24 (2006); (2) fleeing a peace officer in a motor vehicle, in violation of Minn. Stat. § 609.487, subd. 3 (2006); (3) criminal vehicular operation, in violation of Minn. Stat. § 609.21, subd. 2b(4) (2006); (4) driving after license cancellation, in violation of Minn. Stat. § 171.24, subd. 5 (2006); (5) leaving the scene of an accident, in violation of Minn. Stat. § 169.09, subds. 1 and 14(b) (2006); and (6) reckless driving, in violation of Minn. Stat. § 169.13, subd. 1 (2006).

Respondent filed a motion to suppress the evidence discovered as a result of the warrantless removal of her blood. The district court held a contested omnibus hearing on respondent's motion on November 22, 2006. Respondent agreed that the police had probable cause to draw her blood, but she contended the withdrawal was unconstitutional because the police did not show exigent circumstances existed to justify a warrantless seizure.

On January 16, 2007, the district court granted respondent's motion to suppress the evidence discovered as a result of the blood draw. The district court ruled that the seizure was illegal because neither exigent circumstances nor evidence that the officers might have reasonably believed that they were confronted with an emergency existed. The district court ordered the evidence obtained as a result of the warrantless removal of respondent's blood suppressed, and it dismissed the counts of driving while impaired based upon a blood-alcohol concentration of .08 or greater and criminal vehicular operation for lack of probable cause to proceed to trial.

In its appeal of the pretrial order by a prosecuting attorney, the State argued that the district court erred when it granted respondent's motion to suppress. It contended that many cases of both this court and the court of appeals hold that the evanescent nature of blood-alcohol evidence alone supports a finding of exigent circumstances so that a warrantless blood draw is legal when the police have probable cause to believe a defendant violated the criminal vehicular operation statutes.

The court of appeals affirmed the suppression of the evidence obtained from respondent's blood draw. *State v. Shriner*, 739 N.W.2d 432, 439-40 (Minn. App. 2007). The court of appeals ruled that in order for a warrantless, nonconsensual blood draw to meet the requirements of the Fourth Amendment, there must be probable cause and exigent circumstances. *Id.* at 436. After discussing several

opinions by this court,[1] it found that "[a] careful review of our caselaw indicates that although there are comments which lend some support to the state's position, none has expressly held that the presence of alcohol is a per se exigent circumstance sufficient to justify a warrantless blood draw." *Id.* at 437. After reviewing decisions from other jurisdictions, the court of appeals decided that whether exigent circumstances exist must be determined based upon the totality of the circumstances, and that the question was whether "there are factors, together with the suspected presence of alcohol, that constitute exigent circumstances sufficient to justify the warrantless blood draw." *Id.* a 438. Such factors include the amount of time that has elapsed since the accident, the potential unavailability of the defendant once he or she is taken to the hospital for treatment, and the difficulty in obtaining a warrant. *Id.* at 436-37.

The court of appeals then examined the facts of the case and determined that exigent circumstances did not exist. *Id.* at 438-40. It noted the absence of other factors that would support a finding of exigent circumstances, such as respondent being injured, or the arresting officer having competing responsibilities because he or she was responsible for other injured people or the crime scene. *Id.* The court of appeals concluded that, "[b]ased on a two-hour rule

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[1] The court of appeals discussed *State v. Heaney*, 689 N.W.2d 168 (Minn. 2004); *State v. Paul*, 548 N.W.2d 260 (Minn. 1996); *State v. Aguirre*, 295 N.W.2d 79 (Minn. 1980); and *State v. Oevering*, 268 N.W.2d 68 (Minn. 1978). *Shriner*, 739 N.W.2d at 436-37.

to establish guilt" under the DWI and criminal vehicular operations statute, "the question becomes whether a warrant could reasonably have been obtained within a timeframe that would not have compromised the test results." *Id.* at 438. The court of appeals then noted that a warrant could have been obtained directly by the police from a judge over the telephone, and it cited a case where a telephone warrant was obtained at night in a little more than an hour. *Id.* at 439. Because the record was silent on the local warrant process and the State did not claim there is any difficulty in obtaining a nighttime or telephone warrant, the court of appeals was unwilling to assume that the time needed to obtain a warrant created exigent circumstances. *Id* at 440.

On appeal to this court, the State argues that the law enforcement community has been operating under a "bright-line rule" that the dissipation of alcohol alone creates a sufficient exigency to dispense with the warrant requirement in criminal vehicular operation cases. Indeed, at oral argument, the State represented that law enforcement personnel in this state routinely take warrantless blood draws in criminal vehicular operation cases on the belief that they need make no showing that it is impractical to obtain a warrant. The State argues that the U.S. Supreme Court in *Schmerber v. California*, 384 U.S. 757 (1966), announced a "single-factor" exigent circumstance exception to the warrant requirement, this "single-factor" exigency was subsequently incorporated into the doctrine justifying warrantless body searches in the case of *Cupp v. Murphy*, 412 U.S. 291 (1973), and this court subsequently adopted a single-factor test for warrantless blood draws in

reliance on *Schmerber* and *Cupp*.

Shriner contends that neither the U.S. Supreme Court nor this court has held that the dissipation of alcohol dispenses with the warrant requirement altogether. Shriner asserts that *Schmerber* did not categorically recognize blood-alcohol exigency. Rather, Shriner contends, *Schmerber* announced a more prudent rule of law that considers whether the facts of a particular case justify a warrantless blood draw.

The question, therefore, is whether the State is correct that *Schmerber, Cupp,* and this court's precedent have already concluded that a single-factor exigency applies to warrantless blood draws. For the reasons set forth below, I would conclude that U.S. Supreme Court and Minnesota precedent do not answer the question in favor of the State and, moreover, the holding in *Schmerber* compels the conclusion that a totality of the circumstances test remains the appropriate test in this case.

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons * * * against unreasonable searches and seizures." This right is guaranteed by the requirement that a police officer obtain a warrant based on probable cause from a neutral and detached magistrate. *United States v. Place,* 462 U.S. 696, 701 (1983); *Schmerber,* 384 U.S. at 770. A search conducted without a warrant is per se unreasonable. *Place,* 462 U.S. at 701. There are a few well-recognized exceptions to the requirement of a warrant, one of which is the situation of exigent circumstances. *See id.*

In *Schmerber v. California,* the United States

Supreme Court applied a totality of the circumstances test to determine whether exigent circumstances justified a warrantless blood draw to preserve evidence of the suspect's blood-alcohol content. 384 U.S. at 76672. Considering the "special facts" that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops," *id.* at 770-71, that the driver and passenger were injured and needed medical assistance, *see id.* at 758 n.2, 770-71, that the officer needed to investigate the scene of the accident, *id.* at 770-71, and that these last two tasks would take a considerable amount of time, *see id,* the Court determined the officer was reasonable in believing "he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,'" *id.* at 770 (quoting *Preston v. United States,* 376 U.S. 364, 367 (1964)). In concluding that the defendant's Fourth and Fourteenth Amendment rights to be free of unreasonable searches and seizures had not been violated, however, the Court made a point of considering all of the facts in the case:

> It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the State's minor intrusions into an individual's body under *stringently limited conditions* in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Id. at 772 (emphasis added). *Schmerber* clearly does not support a conclusion that a single-factor exigent circumstances exception to the warrant requirement is available simply because of the "rapid, natural dissipation of alcohol in the blood." Rather, *Schmerber* calls for an individualized determination, based on all the circumstances, of whatever exigent circumstances are present.

The majority asserts that "the Supreme Court has stated in subsequent decisions that its holding in *Schmerber* justifies a warrantless blood draw based on the imminent destruction of alcohol caused by the natural processes of the body," citing decisions in *Skinner v. Ry. Labor Executives' Ass 'n,* 489 U.S. 602, 623 (1989), and *South Dakota v. Neville,* 459 U.S. 553, 559 (1983). The majority's reliance on these two decisions to justify finding exigent circumstances based only on the natural dissipation of alcohol in the bloodstream is entirely misplaced. In *Skinner,* the Court addressed the issue of whether the government's need to monitor compliance with restrictions on certain railway employees' use of alcohol and drugs justified warrantless blood and urine tests for all employees involved in an accident or other defined incident, without individualized suspicion. 489 U.S. at 609, 621. The case was brought as a facial challenge to regulations promulgated by the Federal Railroad Administration, *id.* at 606, and therefore what constitutes "exigent circumstances" was not at issue. The *Skinner* Court cited *Schmerber* for the propositions that alcohol is eliminated from the bloodstream at a constant rate and that blood and breath samples must therefore be taken as soon as possible after a triggering event. *Id.* Other

circumstances contributed to the *Skinner* Court's conclusion that the regulations were constitutional: the regulations narrowly defined the circumstances in which testing could be imposed on employees, *id.* at 622; employees certainly knew well before any testing what these circumstances were, *id.;* private railroad supervisors would be setting the testing process in motion, and it would be unreasonable to impose "'unwieldy warrant procedures'" upon persons who, unlike law enforcement, are not familiar with such procedures, *id.* at 623-24 (quoting *O'Connor v. Ortega,* 480 U.S. 709, 722 (1987)). This is not a single factor, but the totality of the particular circumstances.

In *Neville,* the Supreme Court's conclusion that *"Schmerber* * * * clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood-alcohol test" results from its analysis of *Schmerber's* holding on the Fifth Amendment challenge to the blood test. 459 U.S. at 559. *Neville* rejected the claim that admission of evidence of refusal violates the privilege against self-incrimination. *Id.* at 564. *Neville* clearly did not hold that Schmerber was intended to create a single-factor exigency.

Nor does this court's precedent. We have recognized two tests for exigent circumstances: "single factor exigent circumstances, and * * * 'totality of the circumstances.'" *State v. Gray,* 456 N.W.2d 251, 256 (Minn. 1990). We have said that "imminent destruction or removal of evidence" is one of those single-factor situations. *In re Welfare of D.A.G.,* 484 N.W.2d 787, 791 (Minn. 1992); *State v. Hummel,* 483 N.W.2d 68, 72 (Minn. 1992) (describing

the single-factor test as "a situation in which a single matter, such as a fleeing felon or danger to persons or evidence, is highly compelling"); *Gray*, 456 N.W.2d at 256 (citing *Schmerber*, 384 U.S. at 770-71). We have said in dicta that *Schmerber* "recognize[s] the power of a peace officer to compel a blood sample from a driver where there is probable cause to believe the driver has violated a criminal vehicular operation law." *State v. Heaney*, 689 N.W.2d 168, 173 n.2 (Minn. 2004).

The majority insists that if the single-factor test is met, we do not need to consider the totality of the circumstances. My disagreement with the majority is over whether the "single-factor" test for "imminent destruction or removal of evidence" can be met simply because alcohol dissipates in the bloodstream. Until today, this court has never abandoned the requirement that in invoking "imminent destruction or removal of evidence" as a single-factor exigency, the State must explain why the peace officer could reasonably believe that the evidence would "suddenly disappear[]." D.A.G., 484 N.W.2d at 791 (finding the State had "wholly failed to provide facts to support the existence of exigent circumstances under the 'single factor' test"). Focusing on the "loss of [blood-alcohol content] evidence with every passing minute from the time the accident occurred until the blood draw is taken," the majority fails to accord any attention to the length of delay occasioned by fulfilling the warrant requirement. Yet it is the length of the delay that determines whether the evidence will disappear. The majority asserts that "it is undisputed that this loss of the most probative evidence of criminal vehicular operation occurs

during the time it takes to obtain a warrant." I disagree. A blood draw can never be obtained at the precise moment of the accident. As a result, in any case where blood-alcohol content evidence is crucial, an expert witness must extrapolate from the results of the test to determine what the blood-alcohol content was at the moment of the accident. Nothing in this record establishes that a blood draw taken 45 minutes after the accident, as it was in Shriner's case, would be more probative than a blood draw taken 2 hours after the accident.

When addressing the constitutionality of taking blood samples without a warrant, this court has consistently taken into account all circumstances that inform the question of whether a peace officer could reasonably believe there was a risk of "imminent destruction or removal of evidence." In *State v. Oevering,* 268 N.W.2d 68, 74 (Minn. 1978), this court concluded that blood alcohol evidence would have been lost not only because alcohol dissipates with the passage of time, but also because more than 4 hours had passed since the accident.[2] In *State v. Storvick,* 428 N.W.2d 55, 60-61 (Minn. 1988) where the warrantless entry into a suspect's residence was at issue, the police officers' objective belief that a blood-alcohol test was necessary constituted an exigent circumstance when 2 hours had elapsed between a fatal accident and the decision to enter the home, there was strong probable cause that the suspect was in the home and refused to answer repeated knocks on the door, and there was the "additional fact" that

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[2] The issue in the case was whether an arrest was necessary. *Oevering*, 268 N.W.2d at 72.

alcohol levels diminish soon after drinking stops. This court expressly limited its decision to the facts of the case. *Id.* at 61.

In *State v. Speak,* 339 N.W.2d 741, 745 (Minn. 1983), where the issue was probable cause, this court noted that "[e]xigent circumstances were clearly present," but did not discuss why. One hour and 10 minutes passed between the time the police were called to the scene of the accident and the time the breath test was administered. *Id.* at 742-43. In *State v. Paul,* 548 N.W.2d 260, 265-66 (Minn. 1996), this court upheld the warrantless entry into a suspect's home to arrest him because there were two kinds of exigent circumstances: hot pursuit and imminent destruction of evidence. We found that "the need to preserve evidence of Paul's blood alcohol level is *a* compelling exigent circumstance," *id.* at 266 (emphasis added), but we did not conclude that exigent circumstances existed based *only* on the fact that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops," *id.* at 267 (internal quotation marks omitted). In finding that evidence was at risk of destruction, we noted that the suspect's blood-alcohol level "might have dissipated while a warrant was being obtained, or [he] might have drunk more alcohol, making a chemical test unreliable." *Id.* We did not mention a single-factor exigent circumstance, but rather held that "an officer in hot pursuit of a person suspected of the serious offense of driving under the influence of alcohol may make a warrantless entry into the suspect's home in order to effectuate an arrest." *Id.* This court thus relied on the totality of the circumstances to support the conclusion that there was no time to get a

warrant.

Other opinions of this court do not address what is necessary to find the single-factor exigent circumstance of imminent destruction of evidence. In *State v. Aguirre,* 295 N.W.2d 79, 80-81 (Minn. 1980), the issue was whether a blood sample taken because the officer had probable cause to believe a felony offense had been committed could be used as evidence when the State chose instead to prosecute the suspect for a misdemeanor offense. This court stated that the officer "knew that it was essential that he obtain the blood sample without delay and without regard to whether defendant would consent," but the court did not explain what facts led to this conclusion. *Id.* at 82. In *State v. Lee, 585* N.W.2d 378, 380, 383 (Minn. 1998), where the issue was what kind of probable cause was required, this court upheld the taking of a blood sample when the standard implied consent advisory was read to the suspect and he refused to submit to the test. There was no discussion of exigent circumstances. These cases are thus not helpful to deciding the issue here.

In *Tyler v. Commissioner of Public Safety,* 368 N.W.2d 275, 277 (Minn. 1985), this court reviewed the civil revocation of a driver's license under the implied consent law. The issue was whether the police officer had probable cause to require the driver to submit to a test. *Id.* at 278. This court did not address exigent circumstances, but simply stated that federal constitutional law permits a warrantless blood draw if there is probable cause to believe the suspect has committed the offense of DWI and the draw is necessary to preserve evidence. *Id.* (citing *South Dakota v. Neville,* 459 U.S. 553, 558-64 (1983)

(using analysis under Fifth Amendment to conclude that suspect's refusal to consent to test was not protected by the privilege against self-incrimination); *Cupp v. Murphy,* 412 U.S. 291, 295-96 (1973) (allowing a limited search under suspect's fingernails as a search incident to arrest, necessary to preserve evanescent evidence); *Aguirre,* 295 N.W.2d 79). *Tyler* thus offers no help in discerning whether the simple fact that alcohol dissipates in the bloodstream constitutes exigent circumstances.

In conclusion, a review of our cases leads me to the conclusion that our case law does not support a holding that the natural dissipation of alcohol alone creates exigent circumstances justifying a warrantless, nonconsensual blood draw. Rather, we have consistently applied a rule of law that requires a reasonable belief by the officer that there is not enough time to obtain a warrant. I would thus decline to adopt a per se rule.

The majority contends that the view urged by Shriner is "the minority view." I strongly and respectfully disagree with this characterization of the holdings of other courts. In two of the cases cited by the majority in footnote 11, the presence of exigent circumstances was not at issue. *See State v. Entrekin,* 47 P.3d 336, 348 (Haw. 2002) (the defendant did not dispute that exigent circumstances were present); *State v. Woolery, 775* P.2d 1210, 1212-13 (Idaho 1989) (the defendant argued probable cause and lack of conformity with Idaho's implied consent statute). In cases where the exigent circumstances exception is not squarely at issue but addressed only briefly, I do not find the detailed reasoning necessary to conclude that a single-factor exigency exists. *See State v.*

Baker, 502 A.2d 489, 492-94 (Me. 1985) (discussion of probable cause and exigent circumstances not separated).

Other cases cited by the majority in support of a bright-line rule are not on point. *See United States v. Eagle*, 498 F.3d 885, 892 (8th Cir. 2007); *United States v. Reid*, 929 F.2d 990, 993 (4th Cir. 1991); *State v. Cocio*, 709 P.2d 1336, 1344-45 (Ariz. 1985); *State v. Bohling*, 494 N.W.2d 399, 402 (Wis. 1993). The *Cocio* court offered no reasoning for its interpretation of *Schmerber*, and *Cocio* differs factually from this case because the blood draw was initiated by a doctor for medical reasons, rather than by law enforcement. 709 P.2d at 1345. The *Eagle* court stated that "[e]xigent circumstances exist when there is a risk of destruction of evidence, including a risk that a defendant's blood-alcohol content will dissipate because 'the body functions to eliminate [alcohol] from the system.'" 498 F.3d at 892 (alteration in original) (quoting *Schmerber*, 384 U.S. at 77071). But the court did not base its determination that exigent circumstances existed on the simple fact that alcohol dissipates in the bloodstream; it considered whether a warrant could be obtained before the evidence was destroyed or removed. *Id.* Specifically, the court noted that nearly 2-1/2 hours had already passed between the accident and the blood draw and concluded that further delay would have allowed "further dissipation of alcohol" and created a risk that the suspect would be unavailable for a blood draw upon the officer's return. *Id.*

In *Reid*, where a breathalyzer test was at issue, the court took pains to explain that a

telephonic search warrant does not eliminate the exigency because compliance with the rules for obtaining one takes time and "[t]ime is what is lacking in these circumstances." 929 F.2d at 993. The finding of exigent circumstances thus depends not only on the dissipation of alcohol, but also on the fact that obtaining a warrant creates a delay long enough to destroy the evidence. The *Reid* court explicitly laid out three factors in holding that exigent circumstances were present: societal recognition of the government's interest in protecting citizens from drunk drivers, necessity of prompt testing for alcohol in the bloodstream, and the fact that "[b]reathalyzer tests cause a lesser intrusion than blood tests." *Id.* at 994. The *Reid* court's conclusion does not inform our decision here, because its holding concerned breathalyzer tests rather than blood tests.

Only one other court that has directly addressed the precise issue before us has concluded that a per se exigency exists. In *State v. Bohling*, 494 N.W.2d 399, 402 (Wis. 1993), the Wisconsin Supreme Court concluded that *Schmerber* must be read as creating a single-factor exigency, without explaining how such an interpretation was possible in the face of *Schmerber's* admonition that its holding "in no way indicates that [the Constitution] permits more substantial intrusions, or intrusions under other conditions," 384 U.S. at 772. For this reason, I do not find the *Bohling* court's reasoning persuasive.

One other state court directly addressing the precise issue in this case is persuasive on why this court should reject a per se exigency. *State v. Rodriguez*, 156 P.3d 771 (Utah 2007). In reading *Schmerber*, the Utah court pointed to three categories

of "special facts" that combined to create an exigency, as well as to the Court's emphasis on the "stringently limited conditions" under which a warrantless intrusion could be made into an individual's body. *Id.* at 776. It refused to assume that unacceptable delay always accompanies efforts to obtain a warrant, pointing to the availability of technology to aid in more rapid procedures. *Id.* at 778. It expressed confidence in the ability of law enforcement officials and courts to request and issue warrants within a timeframe that ensures the preservation of evidence. *Id.* at 779.

The Iowa Supreme Court recently addressed the admission of test results from a warrantless blood draw, within the context of its implied consent statute, and rejected *Bohling's* reasoning in favor of *Rodriguez's*. *State v. Johnson*, 744 N.W.2d 340, 344 (Iowa 2008). Interestingly, in both *Rodriguez* and *Johnson*, the court considered the totality of the circumstances and concluded that the warrantless blood draw did not violate the Fourth Amendment. *Johnson*, 744 N.W.2d at 344-45; *Rodriguez*, 156 P.3d at 782.

Based on my reading of *Schmerber*, of this court's precedent, and of decisions from other courts, I would hold that an individual determination of whether exigent circumstances exist, based on the totality of the circumstances, must be made in each case. Like the *Rodriguez* court, I am confident that law enforcement and the courts in Minnesota are fully able to evaluate the circumstances and make these determinations without a per se exigency. I would not, as the majority suggests, require police officers to know with certainty how long it would take

to obtain a warrant or when the suspect had his or her last drink. I would simply require that the officer be reasonable in his or her belief that the delay necessary to obtain a warrant would result in destruction of the blood-alcohol evidence.

In this case, the police officer who stopped and arrested Shriner did not have the responsibility of investigating the accident or seeking medical attention for any injured person. Nor did Shriner herself need medical attention. The officer was not worried that Shriner would quickly "slip under the legal limit." The accident occurred close to a hospital. The State presented no evidence of exigent circumstances other than the natural dissipation of alcohol in the bloodstream. Applying a "totality of the circumstances" test, I would affirm the district court's suppression of Shriner's blood test results.

ANDERSON, Paul H., Justice (dissenting).

I join in the dissent of Justice Meyer.

STATE OF MINNESOTA
IN COURT OF APPEALS
A07-181

State of Minnesota,
Appellant,

vs.

Janet Sue Shriner,
Respondent.

Filed October 2, 2007
Affirmed
Minge, Judge
Dissenting, Willis, Judge

Dakota County District Court
File No. K8-06-1570

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

James C. Backstrom, Dakota County Attorney, Debra E. Schmidt, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for appellant)

Jeffrey B. Ring, Jeffrey B. Ring and Associates, The Interchange Tower, Suite 1690, 600 South Highway 169, Minneapolis, MN 55426 (for respondent)

Considered and decided by Willis, Presiding Judge; Minge, Judge; and Hudson, Judge.

SYLLABUS

Exigent circumstances, in addition to evidence of alcohol consumption, are constitutionally necessary to authorize a warrantless, nonconsensual blood draw for use in a prosecution for criminal vehicular operation.

OPINION

MINGE, Judge

The state challenges the pretrial suppression of the results of a warrantless, nonconsensual blood draw, arguing that the presence of alcohol constitutes sufficient exigent circumstances to justify a blood draw. Because we conclude that under the facts present, there was insufficient evidence of exigent circumstances, we affirm.

FACTS

Respondent Janet Shiner was involved in a two-car motor-vehicle accident on May 8, 2006, at approximately 9:26 p.m. in Burnsville. Shiner drove her vehicle in the wrong lane of traffic and struck another vehicle head-on, injuring the driver of the other vehicle. Shiner fled the scene of the accident in her vehicle. Burnsville Police Officer Maksim Yakovlev was dispatched to find Shiner. Officer Yakovlev located and, with the assistance of another officer, forcibly stopped Shiner's vehicle. Because Shiner did not comply with the officers' requests to step out of her vehicle and its doors were locked, the officer broke a window, opened a door, and removed Shiner. Officer Yakovlev observed that Shiner's eyes were bloodshot and glazed-over, that she smelled of alcohol, and that she could not stand on her own. He also observed that she was not injured.

Officer Yakovlev arrested Shiner and transported her to nearby Fairview Ridges Hospital. Once there, he directed hospital staff to make a blood. The draw was completed less than 45 minutes after the time of the arrest. Shriner's consent was not sought or obtained and no implied-consent advisory

was given to her. Officer Yakovlev testified that he was not "worried [that Shriner] was about to slip under the legal limit at any given moment," and he did not attempt to obtain a search warrant.

Shriner was subsequently charged with seven criminal counts including first-degree driving while impaired, in violation of Minn. Stat. § 169A.20, subd. 1(5) (2004), and criminal vehicular operation resulting in bodily harm, in violation of Minn. Stat. § 609.21, subd. 2b(4) (2004).

The district court held an omnibus hearing at which Shriner moved to suppress the blood-test results. Shriner conceded the existence of probable cause to seek the blood test, but asserted that without her consent or a warrant, the blood draw was improper. After granting Shriner's motion to suppress the blood-test evidence, the district court dismissed the first-degree driving-while-impaired and criminal-vehicular-operation charges under Minn. Stat. §§ 169A.20, subd. 1(5) and 609.21, subd. 2b(4). This appeal by the state follows.

ISSUES

I. Did the suppression of blood-test results have a critical impact on the state's case?

II. Did the district court err in suppressing the blood-test evidence?

ANALYSIS

The district court's decision to suppress evidence is a question of law, and we "independently review the facts" to determine whether the decision is erroneous. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). If the state appeals from a pretrial suppression

order, it must "clearly and unequivocally show both that the [district] court's order will have a critical impact on [its] ability to prosecute the defendant successfully and that the order constituted error." *State v. Scott,* 584 N.W.2d 412, 416 (Minn. 1998) (quotation omitted). "[T]he critical impact of the suppression must be first determined before deciding whether the suppression order was made in error." *Id.*

I.

The first issue is whether the suppression of the result of the blood test will have a critical impact on the state's case. In a critical-impact inquiry, we consider whether "the lack of the suppressed evidence completely destroys the state's case" or "significantly reduces the likelihood of a successful prosecution." *State v. Kim,* 398 N.W.2d 544, 551 (Minn. 1987). Suppression of alcohol-level test results has a critical impact even if there is other evidence of intoxication. *State v. Ault,* 478 N.W.2d 797, 799 (Minn. App. 1991).

Here, the significance of the district court's order suppressing the blood-test evidence is apparent. The district court determined that the charges of both criminal vehicular operation and first-degree driving while impaired required proof that Shriner's blood-alcohol level was above .08. Because evidence of Shriner's blood-alcohol level was suppressed, both charges were dismissed.[1] Thus, the suppression of

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[1] We note that five charges remained against Shriner. The parties do not argue and we do not consider whether the suppression order has a critical impact on those charges or whether the survival of those charges is relevant to the critical-impact question. We also note that this court has adopted the view that "even an order dismissing only one

this significant evidence has a critical impact on the state's case.

The next issue is whether the district court erred in suppressing the blood-test evidence. The state contends that exigent circumstances justified a warrantless draw of Shriner's blood.

The United States Constitution's Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. Our state constitution contains a parallel provision. Minn. Const. art. I, § 10. A search and seizure conducted without a warrant is per se unreasonable. *State v. Othoudt,* 482 N.W.2d 218, 221-22 (Minn. 1992). A warrant must be supported by probable cause. Minn. Const. art. I, § 10. "The requirement that a warrant be obtained is a requirement that inferences to support the search be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Schmerber v. California,* 384 U.S. 757, 770, 86 S. Ct. 1826, 1835 (1966) (quotation omitted). But the warrant requirement is "'subject . . . to a few specifically established and well delineated exceptions.'" *State v. Hanley,* 363 N.W.2d 735, 738 (Minn. 1985) (quoting *Katz v. United States,* 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). "The state bears the burden of showing that at least one of the exceptions applies in order to avoid suppression of the evidence acquired from the warrantless search." *State v. Johnson,* 689 N.W.2d 247, 251 (Minn. App. 2004),

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count of a multi-count complaint may have critical impact." *State v. Koenig,* 649 N.W.2d 484, 487 (Minn. App. 2002).

review denied (Minn. Jan. 20, 2005). One such exception is the existence of exigent circumstances. *State v. Paul*, 548 N.W.2d 260, 264 (Minn. 1996).

The administration of a blood test is considered a search that must comply with the Fourth Amendment. *Schmerber*, 384 U.S. at 767, 86 S. Ct. at 1834. In order to meet the requirements of the Fourth Amendment, a warrantless, nonconsensual blood draw must be supported by both probable cause and exigent circumstances. *State v. Aguirre*, 295 N.W.2d 79, 81 (Minn. 1980). Probable cause to search exists when, given the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995). Here, Shriner stipulates that the deputy had probable cause to believe that she was under the influence of alcohol. Therefore, the sole disputed issue in this case is whether exigent circumstances justified the warrantless, nonconsensual blood draw.

When determining whether the situation presented exigent circumstances, we examine the totality of the circumstances. *State v. Lohnes*, 344 N.W.2d 605, 611 (Minn. 1984). But "[e]xigent circumstances can [also] be established . . . by a single factor." *Johnson*, 689 N.W.2d at 251. Exigent circumstances exist when there is a danger of the "imminent destruction of evanescent evidence." *Paul*, 548 N.W.2d at 264. Because alcohol in the blood has an evanescent quality, a warrant may not be necessary for a blood draw, depending on the amount of time that has elapsed since the accident and the difficulty in obtaining a warrant. *See Schmerber*, 384 U.S. at 770-71, 86 S. Ct. at 1836. In *Schmerber*, the

Supreme Court concluded that exigent circumstances were present because the officer, who authorized a warrantless blood draw within two hours of an accident,

> might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence. We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant.

Id. at 770-71, 86 S. Ct. at 1835-36 (quotation and citation omitted). And in conducting an exigent-circumstances analysis, Minnesota cases have emphasized factors such as the evanescent nature of alcohol in the blood, the passage of time, and the potential unavailability of the defendant once he or she is taken to the hospital for treatment. *See, e.g., State v. Oevering*, 268 N.W.2d 68, 74 (Minn. 1978).

The state contends that exigent circumstances existed justifying the warrantless draw of Shriner's blood. The state essentially takes the position that due to the evanescent nature of alcohol, the presence of alcohol in an individual reasonably suspected of an alcohol-related crime is an exigent circumstance per

se justifying a warrantless blood draw. To support its position, the state cites numerous previous decisions of the supreme court and both published and unpublished opinions of this court, including *Paul*, 548 N.W.2d at 266; *State v. Heaney*, 689 N.W.2d 168, 173 n.2 (Minn. 2004); *Aguirre*, 295 N.W.2d at 79; and our decision in *Johnson*, 689 N.W.2d at 252. In *Paul*, the supreme court recognized the need for officers to "act as quickly as possible" to avoid the dissipation of blood-alcohol evidence. 548 N.W.2d at 267. In *Heaney*, the supreme court again noted the "natural exigency involved in obtaining blood-alcohol evidence." 689 N.W.2d at 173 n.2. Although the *Aguirre* decision upheld the constitutionality of a nonconsensual, warrantless blood draw, the issues on appeal concerned the lack of an arrest and the interplay between the implied-consent law and the level of charges. 295 N.W.2d at 80-83. The *Aguirre* court did not consider the U.S. Supreme Court's decision in *Schmerber*. And in *Johnson*, we concluded that, *based on the facts of the case*, the possible destruction of blood-alcohol evidence amounted to an exigent circumstance supporting a warrantless search. 689 N.W.2d at 252. Several other cases deal with the intricacies of the implied-consent law. *See* Frederic Bruno, *The Drinking Driver in Minnesota* § 2.10 (3rded. 2006).[2]

A careful review of our caselaw indicates that although there are comments which lend some support to the state's position, none has expressly held that the presence of alcohol is a per se exigent

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[2] We emphasize that no implied-consent advisory was given to respondent and that we do not consider Minn. Stat. §§ 169A.50 - .53 (2006).

circumstance sufficient to justify a warrantless blood draw. Other jurisdictions take conflicting positions on this issue. *Compare State v. Rodriguez,* 156 P.3d 771, 782 (Utah 2007) (declining to assign "per se exigent circumstance status" to warrantless blood draws, but upholding warrantless blood draw at issue in the case based on the totality of the circumstances), *with State v. Cocio,* 709 P.2d 1336, 1344-46 (Ariz. 1985) (allowing police to obtain blood without a warrant when blood has already been drawn for medical purposes), *and State v. Bohling,* 494 N.W.2d 399, 400 (Wis. 1993) ("[T]he dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw"). A close reading of *Schmerber* and other United States Supreme Court decisions does not support the state's position. *See, e.g., Skinner v. Ry. Labor Excecutives' Ass'n,* 489 U.S. 602, 109 S. Ct. 1402 (1989) (upholding a warrantless blood draw in civil investigations of railroad accidents); *South Dakota v. Neville,* 459 U.S. 553, 103 S. Ct. 916 (1983) (rejecting a claim that admission of evidence of refusal to submit to blood-alcohol test violates the privilege against self-incrimination).

In *Rodriguez,* the Utah Supreme Court reviewed the legal landscape on this issue, determined that *Schmerber* is still good law, and concluded:

> In light of the foregoing, it is difficult for us to imagine that the United States Supreme Court could muster the assurance that the consequences of alcohol dissipation are so great and the prospects for prompt warrant acquisition

> so remote that per se exigent circumstance status be awarded to seizures of blood for the purpose of gathering blood-alcohol evidence. Accordingly, we decline to grant per se exigent circumstance status to warrantless seizures of blood evidence.

156 P.3d at 782. The Fourth Amendment represents a fundamental public policy state. We decline the opportunity to reject the United States Supreme Court's decision in *Schmerber* and to adopt a per se rule.

The question then becomes whether in this proceeding there are factors, together with the suspected presence of alcohol, that constitute exigent circumstances sufficient to justify the warrantless blood draw. We employ a totality-of-the-circumstances approach. Here, Shriner was arrested at her vehicle one-half mile from Fairview Ridges Hospital. Officer Yakovlev quickly transported Shriner to that hospital and a blood draw was made less than 45 minutes after she was last in the driver's seat of her vehicle. He did not give her the implied-consent advisory or seek her consent to the draw. Officer Yakovlev did not believe that Shriner was injured, did not have responsibility for any other person injured as a result of the accident, and did not have a crime scene that required his attention. He was able to focus on acquiring evidence of Shriner's intoxication. Based on a two-hour rule to establish guilt under Minn. Stat. §§ 169A.20, subd. 1(5) (2004), and 609.21, subd. 2b(4) (2004), the question becomes whether a warrant could reasonably have been obtained within a timeframe that would not have

compromised the test results.[3]

The process for obtaining a search warrant is set out in the statutes and court rules. *See* Minn. Stat. §§ 626.04 to .18 (2006); Minn. R. Crim. P. 36. Although the prosecuting attorney often handles the application for a search warrant, law enforcement may apply directly to the judge. *See, e.g., State, City of Minneapolis v. Cook*, 498 N.W.2d 17, 18-19 (Minn. 1993); *State v. McGrath*, 706 N.W.2d 532, 537 (Minn. App. 2005). In this case, it was evening. The Burnsville police officers may have had to contact a prosecuting attorney at home to prepare a warrant request. Next, law enforcement would have had to locate a judge, request a warrant, obtain the warrant, and then provide evidence of the warrant to the staff at the Fairview Ridges Hospital to authorize the nonconsensual blood draw. This takes expeditious action.

Minnesota law authorizes the use of telephonic warrants. *See* Minn. R. Crim. P. 36.01. Caselaw has recognized the availability and validity of telephonic search warrants. *See, e.g., State v. Lindsey*, 473 N.W.2d 857 (Minn. 1991). In *State v. Raines*, 709 N.W.2d. 273, 275 (Minn. App. 2006), *review denied* (Minn. Apr. 18, 2006), police officers requested a telephonic warrant at 3:10 a.m. in Pine County. The warrant was executed within one hour and fifty minutes. *Id.* And in *State v. Cook*, 498 N.W.2d 17, 18-19 (Minn. 1993), a judge issued a telephonic search warrant less than one hour after the request for the

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[3] "Generally, the rate by which an individual eliminates alcohol from his [or her] body is 0.015% per hour." Kimberly S. Keller, *Sobering up* Daubert: *Recent Issues Arising in Alcohol-Related Expert Testimony*, 46 S. Tex. L. Rev. 111, 125 (2004).

warrant was made. Here, the state has made no showing that it would have been unable to obtain a timely telephonic search warrant.

The state argues that the existence of probable cause to believe that Shriner had violated the criminal-vehicular-operation statute justifies the warrantless blood draw. The state cites Minn. Stat. § 169A.52, subd. 1 (2004), which provides that "if a peace officer has probable cause to believe that the person has violated section 609.21 (criminal vehicular homicide and injury), a test may be required and obtained despite the person's refusal." "When an officer has probable cause to believe [that] a driver is intoxicated and has committed criminal vehicular operation, the officer may order the taking of a blood sample without obtaining the driver's consent." *State v. Condon*, 497 N.W.2d 272, 275 (Minn. App. 1993). But as we have already determined, the constitutional requirements for a nonconsensual search include both probable cause *and* either a search warrant or the existence of one of the warrant exceptions. Neither the statute nor the *Condon* case mentions the constitutional limits on searches and the necessity of exigent circumstances to dispense with search warrants.

We note that although the constitutional limits on searches was argued to and addressed by the district court, and is argued by the parties on appeal, the district court did not consider, and on appeal the parties do not address, the constitutionality of Minn. Stat. § 169A.52, subd. 1. We do not usually consider legal issues not properly raised. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But we assume that the legislature does not

intend to violate the constitution. Minn. Stat. § 645.17(3) (2006). We therefore note that Minn. Stat. § 169A.52, subd. 1, does not refer to search warrants. We construe the subsection as not dispensing with the warrant requirement when a warrant can be obtained and is otherwise required by the constitution. Likewise, we consider the exigent-circumstances requirement as a part of the statute. In reaching this conclusion, we emphasize that the exigent-circumstances requirement is not a high threshold. The physical condition of the suspect and other persons, the evanescent nature of alcohol in the blood, and the time requirements needed to obtain a warrant and a blood test no doubt will combine to constitute exigent circumstances in most cases.

Here, the district court did not find that exigent circumstances existed to dispense with the warrant requirements. As already noted, the totality of the circumstances do not support an exigency determination. Officer Yakovlev testified that he was not concerned about the dissipation of alcohol from Shriner's blood. The scene of the arrest was near the hospital; the time needed to make a blood draw was minimal. The officer was not faced with competing responsibilities. Equally significant, the district court did not find that obtaining a nighttime search warrant was time consuming or created exigent circumstances. The record is silent on the local warrant process and the state does not claim that there is any difficulty in obtaining nighttime or telephonic warrants. On this record, when neither the prosecution nor the district court judge was concerned with the officer's ability to promptly obtain a warrant, and the district court held a warrant

should have been obtained, we are unwilling to reverse the district court and assume that the time needed to obtain a warrant created an exigent circumstance.

The state argues that given the inherent stress that accompanies an accident and arrest situation, the officer should not have to make a judgment call on whether a warrant can be obtained. We do not suggest that the officer's decision is easy. In determining whether a situation presented exigent circumstances, district courts give due consideration to the wide range of circumstances facing law enforcement. *See, e.g., Rodriguez,* 156 P.3d at 781 (emphasizing that serious nature of accident and injuries, together with significant evidence of driver's impairment were "sufficient to establish that the interests of law enforcement outweighed . . . [the driver's] privacy interests"). On this record where no extenuating circumstance other than the evanescent quality of alcohol is present, we conclude the district court did not err in holding that the police officer must obtain the driver's consent or obtain a warrant.

DECISION

The Fourth Amendment of the United States Constitution precludes using the results of a warrantless, nonconsensual blood draw in a criminal prosecution unless law enforcement has probable cause to believe criminal conduct has occurred and there are exigent circumstances in addition to evidence of alcohol consumption. Because the record in this proceeding does not show the presence of necessary exigent circumstances, we affirm.

Affirmed.

Dated: October 2, 2007

WILLIS, Judge (dissenting)

I respectfully dissent from the majority's holding, which would require an on-the-scene assessment of the degree of exigency of the need for alcohol-concentration testing even when police believe a serious criminal offense has occurred.

As the majority points out, both probable cause and exigent circumstances are needed to justify the warrantless removal of blood. *State v. Aguirre,* 295 N.W.2d 79, 81 (Minn. 1980). The majority asserts that there is no authority holding that the presence of alcohol, and the need, therefore, to test for it, is by itself an exigent circumstance. But our supreme court has unmistakably implied that it is, even when the less-serious offense of DWI is the only crime suspected. *See Tyler v. Comm'r of Pub. Safety,* 368 N.W.2d 275, 278 (Minn. 1985) (stating that warrantless removal of blood is constitutional if there is probable cause to believe that the offense of DWI has been committed "and that the removal of the blood is necessary to preserve evidence of guilt"). The majority cites no Minnesota decision requiring a case-by-case assessment of the exigency of the need for alcohol testing that its decision imposes, even in DWI cases, which are less serious than the crime suspected in this case.

The majority's holding rests on a highly selective reading of the caselaw in Minnesota. The majority notes that *Aguirre* fails to consider *Schmerber.* But that is because in *Aguirre* the supreme court treats as settled law its decision in *State v. Oevering,* 268 N.W.2d 68, 72 (Minn. 1978), in which it broadly construed *Schmerber* as recognizing exigent circumstances when "destruction of the

evidence (i.e., the blood-alcohol content) is threatened." This broad reading of Schmerber is essential to the development of implied-consent law in Minnesota. Without it, the supreme court could not have stated, as it did in *Nyflot v. Comm'r of Pub. Safety*, after citing *Schmerber*, that the legislature "could repeal the implied consent law and direct police officers to administer chemical tests against the suspect's will." 369 N.W.2d 512, 517 (Minn. 1985). That view of *Schmerber* leaves no room for the majority's reading of the case as limited to its facts, a reading that the majority treats not just as an arguable interpretation of *Schmerber* but as its unchallenged holding.

In cases involving the more serious offense of criminal vehicular operation (or homicide), our supreme court has long held that police need not resort to the implied-consent statute, or otherwise obtain the driver's consent, in order to constitutionally obtain a blood sample without a warrant. *See State v. Speak*, 339 N.W.2d 741, 744-45 (Minn. 1983); *Aguirre*, 295 N.W.2d at 82. In none of these cases has the supreme court held that the exigency of obtaining a blood sample depends on the degree of the driver's apparent intoxication, the distance from a hospital, or the logistics of obtaining a telephonic search warrant, some of the factors cited by the majority. Requiring police officers to balance such factors on the scene poses an impossible burden.

Assessing the relevant "exigency" factors is not an easy task even for a court. For example, the driver's apparent degree of intoxication is not as relevant as the majority suggests. The supreme court has emphasized that an officer need not have

probable cause to believe that a driver is intoxicated in order to have blood drawn, only "probable cause to believe that administration of a blood alcohol test will result in the discovery of evidence relevant in the prosecution of a crime." *State v. Lee,* 585 N.W.2d 378, 382 (Minn. 1998). And a driver cannot be too drunk for her alcohol concentration to be relevant evidence. The officer at the scene cannot gauge a driver's alcohol concentration or know whether a prosecutor would prefer to charge her with negligent driving while impaired or negligent driving with an alcohol concentration over .08. The exigency exists because "the removal of the blood is necessary to preserve evidence," *Tyler,* 368 N.W.2d at 278, not because the driver's intoxication is a close question.

In summary, there is a bright-line rule that the majority opinion obscures. The obscuring of that line will cause confusion for the police. *See State v. Schinzing,* 342 N.W.2d 105, 109 (Minn. 1983) (noting that requiring case-by-case assessment of whether police can ask for a driver's license "would create unnecessary confusion among the police"). Police officers should not have to balance likely intoxication levels against the logistics of telephonic warrants at the scene of a serious accident.

STATE OF MINNESOTA DISTRICT
COUNTY OF DAKOTA COURT
FIRST JUDICIAL DISTRICT

State of Minnesota, Plaintiff,
v.
Janet Sue Shriner Defendant.

File No. K8-06-1570

FINDINGS OF FACT AND ORDER

The above-entitled matter came on for Contested Omnibus Hearing before the Honorable David L. Knutson, Judge of District Court, on November 22,2006, at the Dakota County Judicial Center in Hastings, Minnesota.

Assistant Dakota County Attorney Debra Schmidt, Esq. appeared on behalf of Plaintiff.

Jeffrey B. Ring, Esq. appeared on behalf of Defendant.

Now, THEREFORE, the Court having considered the matter, being fully advised in the premises, upon all the files, records and proceedings herein, and upon the argument of counsel, makes the following:

FINDINGS OF FACT

1. Probable cause existed to believe that a blood alcohol test would result in the discovery of evidence relevant to prosecuting Defendant for a violation of Minn. Stat. § 609.21 (Criminal Vehicular Injury).

2. Neither exigent circumstances nor evidence that officers might have reasonably believed that they were confronted with an emergency existed in this matter to allow officers to remove Defendant's blood without a warrant.

3. Defendant's statement regarding needing to talk to a "counselor" was ambiguous and related to her alcohol impairment. Therefore the continued questioning of Defendant did not violate Defendant's Miranda rights.

ORDER

1. Defendant's motion to suppress evidence discovered as a result of the warrantless removal of Defendant's blood is granted.

2. Defendant's motion to suppress Defendant's statement to police on May 8, 2006 is denied.

3. Counts 2 and 4 of the Complaint filed on May 10, 2006 are dismissed due to a lack of probable cause to support the counts.

4. The attached Memorandum of Law is incorporated herein.

January 11, 2007

BY THE COURT
s/
David L. Knutson
Judge of District Court

Memorandum

On May 10, 2006, Plaintiff filed a Complaint charging Defendant with: Count 1 — First Degree Driving While Impaired in violation of Minn. Stat. § 169A.20, subd. 1(1), § 169A.24, and § 169A.276; Count 2 — First Degree Driving While Impaired (over 0.08) in violation of Minn. Stat. § 169A.20, subd. 1(5), § 169A.24, and § 169A.276; Count 3 — Fleeing a Peace Officer in a Motor Vehicle in violation of Minn. Stat. § 609.487, subd. 3; Count 4 — Criminal Vehicular Operation Resulting in Bodily Harm (over 0.08) in violation of Minn. Stat. § 609.21, subd. 2b(4); Count 5 — Driving After Cancellation in violation of Minn. Stat. § 171.24, subd. 5; Count 6 — Leaving the Scene of a Personal Injury Accident in violation of Minn. Stat. § 169.09, subd. 1 and subd. 14(b); and Count 7 — Reckless Driving in violation of Mimi. Stat. § 169.13, subd. 1. These charges stem from an incident on May 8, 2006 at approximately 9:26 p.m., when the Complaint alleges Defendant was involved in an accident in the area of McAndrews Road and 141St Street in Burnsville, Minnesota. The Complaint alleges that Defendant drove in the wrong lane, hit another vehicle head on, causing a head and leg injury to a victim in the other vehicle, and then left the scene of the accident ultimately requiring that officers forcibly stop her vehicle and break the front passenger window of Defendant's vehicle in order to remove her from the vehicle. Following the stop of Defendant's vehicle Officer Maksim Yakovlev transported Defendant to Fairview Ridges Hospital and had a nonconsensual blood sample drawn from Defendant by 10:11 p.m. The Implied Consent Advisory was not read to Defendant and a breath test

was not asked for. Defendant was then transported to the Burnsville Police Department where she gave a statement to Officer Yakovlev.

At the Contested Omnibus Hearing, Defendant asked the court to suppress evidence discovered as a result of the warrantless removal of Defendant's blood and to suppress Defendant's statement as being involuntary and in violation of Defendant's Miranda rights.

The Fourth Amendment warrant requirement for searches and seizures forbids any intrusions beyond the body's surface absent a warrant or emergency. In Schmerber v. California, 384 U.S. 757, 770-771(1966), blood was withdrawn from the defendant, without his consent, while the defendant was receiving treatment for injuries at the hospital. The Court concluded "where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." Therefore, *"[g]iven these special facts"* (emphasis added), Id. at 771, and *"only on the facts of the present record"* (emphasis added), Id. at 772, the minor intrusion of an emergency nonconsensual blood draw was appropriate incident to the defendant's arrest. Based upon Schmerber, courts have adopted a two part test of probable cause to believe evidence of a crime would be discovered and exigent circumstances, for the warrantless nonconsensual removal of blood. *See e.g.*, State v. Aguirre, 295 N.W.2d 79 (Minn. 1980). In the present matter, Defendant does not argue that officers lacked probable cause to believe evidence of a crime would be discovered. Defendant argues only that exigent circumstances did not exist in this

matter.

"The United States Supreme Court has determined that exigent circumstances exist in cases of hot pursuit [United States v. Santana, 427 U.S. 38 (1976)], danger-to human life [Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967)], imminent destruction of evanescent evidence [Schmerber, 384 U.S.], and possible flight of a suspect [Johnson v. United States, 333 U.S. 10 (1948)]." State v. Paul, 548 N.W.2d 260, 264 (Minn. 1996), *citing* State v. Lohnes, 344 N.W.2d 605, 610 (Minn. 1984). In the present matter, Defendant was in custody and had no injuries of any kind, therefore the only exigent circumstance that could exist is the imminent destruction of evanescent evidence.

Defendant argues that based on the Minnesota Court of Appeals' unpublished decision in State v. Keocher, CX-02-2251 (Minn. App. 2003), there was insufficient proof of imminent destruction of evanescent evidence and therefore exigent circumstances did not exist under the facts present. The Keocher court held that where there is minimal lapse of time between the accident and the blood withdrawal and there are no allegations that the defendant required prolonged medical, care that would make the defendant unavailable, that there may be an insufficient proof of exigent circumstances. Defendant argues that in the present matter only forty-five (45) minutes had elapsed between the accident and the blood withdrawal, that there was no need for Defendant to be hospitalized, and therefore there is insufficient proof of exigent circumstances. Plaintiff argues that Keocher is inapplicable to the present matter because Keocher dealt with a single

car accident and therefore Criminal Vehicular Operation 'could not have been charged.

Plaintiff counters Defendant's claims by arguing that a natural exigency exists in obtaining blood-alcohol evidence that will naturally dissipate from the body. Plaintiff bases this argument, however, on a mistaken belief that the Schmerber decision, and its progeny, create a bright line rule that exigent circumstances always exist in regards to blood-alcohol evidence. On the contrary, while Schmerber does note that alcohol in the blood begins to dissipate shortly after drinking stops, the court was very careful to state that Schmerber was decided on the specific facts present in that case, and that a nonconsensual blood draw requires *both* probable cause and exigent circumstances. If the Schmerber holding was that dissipation of blood alcohol is always an exigent circumstance, in and of itself, the second prong of the test would be unnecessary. The inclusion of the requirement of exigent circumstances, however, coupled with the statement that Schmerber was decided on the specific facts, means that this court must look at the specific facts of this matter to determine whether exigent circumstances existed. To do otherwise would eliminate the second prong of the Schmerber test, require that there only be probable cause to believe the individual was involved in the accident, and be in clear violation of controlling constitutional law.

Turning then to the question of when a danger of imminent destruction of the evidence exists, it is unclear from the Schmerber opinion exactly how much time had elapsed in Schmerber between the accident and blood draw, however, a footnote in State

v. Keocher, CX-02-2251 (Minn. App. 2003), states that two (2) hours had elapsed in Schmerber. Additionally, other courts have held that exigent circumstances existed when four (4) hours had elapsed since the accident and the suspect was unconscious, State v. Oevering, 268 N.W.2d 68, 74 (Minn. 1978), when three (3) hours had elapsed since the accident, State v. Storvick, 428 N.W.2d 55 (Minn. 1988), when one (1) hour and ten (10) minutes had passed before a breath test was administered, State v. Speak, 339 N.W.2d 741 (Minn. 1983), and when blood alcohol content needs to be determined "within a reasonable time following the accident," State v. Johnson, 689 N.W.2d 247, 252 (Minn.App. 2004). In the present matter, a mere forty-five (45) minutes elapsed between the accident and nonconsensual drawing of Defendant's blood.

Nonetheless, Plaintiff argues that Minnesota case law refutes Defendant's claim that exigent circumstances did not exist in this matter. To support this argument Plaintiff cites a number of cases that fail to explain why exigent circumstances existed under their facts, and therefore the cases' holdings are only of slight use in the decision facing the court in the present matter.

First, State v. Paul, 548 N.W.2d at 267-268, held that exigent circumstances existed to allow for a warrantless entry into a home in order to effectuate arrest when officers were in hot pursuit of a drunk driving suspect that fled into the home, the suspect would not answer the door, and the suspect's wife claimed the suspect was not home. Paul, however, deals only with an officer's need to *enter a home* to avoid dissipation of alcohol or a defendant drinking

more alcohol. Id. at 267. Additionally, the court in Paul was careful to limit its holding by stating, "we hold only that an officer in hot pursuit of a person suspected of the serious offense of driving under the influence of alcohol may make a warrantless entry into the suspect's home in order to effectuate arrest." Id. at 268. Clearly, the primary exigent circumstance in Paul was that of hot pursuit.

Second, State v. Heaney, 689 N.W.2d 168, 173 n.2 (Minn. 2004), a case dealing with a conflict of laws regarding doctor/patient privilege, provides no support for Plaintiff s argument by simply noting in a footnote that there is a power to compel a blood test, but not discussing, beyond citing Schmerber and Oevering, when that power may be used. Similarly, State v. Aguirre, 295 N.W.2d 79 (Minn. 1980), which deals primarily with whether Minnesota statute bars the use of blood removed when a felony is suspected, but only a misdemeanor is charged, simply reiterates that warrantless nonconsensual removal of blood is allowed when there is probable cause and exigent circumstances. Also, State v. Mellett, 642 N.W.2d 779 (Minn. App. 2002), simply states that Schmerber allows for warrantless blood draws during a discussion of whether the state may criminalize test refusal in a DWI case. Heaney, Aguirre, and Mellett are therefore not useful in weighing the facts in the present matter.

Third, Tyler v. Commissioner of Public Safety, 368 N.W.2d 275, 278 (Minn. 1985), a case dealing with whether warrantless nonconsensual blood tests are admissible in Implied Consent proceedings, cites South Dakota v. Neville, 459 U.S. 553 (1983), Cupp v. Murphy, 412 U.S. 291 (1973), and Aguirre, to simply

state, without any reasoning that would be useful to this court, that the blood test was "justified under the constitution." Similarly, the court in State v. Lee, 585 N.W.2d 378 (Minn. 1998), fails completely to discuss the exigent circumstances requirement and deals only with whether officers had probable cause to make a warrantless nonconsensual blood draw in that particular case before ruling the test constitutional. These blanket statements that a particular blood test was constitutional do little to inform this court on whether the specific facts of the present case rise to the level of exigent circumstances as defined by the U.S. Supreme Court as hot pursuit, Santana 427 U.S., danger to human life, Hayden, 387 U.S., imminent destruction of evanescent evidence, Schmerber, 384 U.S., and possible flight of suspect, Johnson, 333, U.S.

Finally, the courts in both State v. Condon, 497 N.W.2d 272 (Minn. App. 1993) and State v. Raymond, A03-295 (Minn. App. 2004), simply state that "[t]he necessity of immediate action to avoid the loss of [blood alcohol] evidence is an exigent circumstance justifying the warrantless removal of blood." Condon, 497 N.W.2d at 275. Neither case explains how much time had elapsed between accident and testing, gives any particulars regarding why immediate action was required, or examines exigent circumstances as defined by the U.S. Supreme Court. Therefore they are not useful to this court in determining whether immediate action was required in the present matter.

Based on a thorough reading of the foregoing case law dealing with the warrantless nonconsensual removal of blood in cases of criminal vehicular operation it is clear to this court that the facts of each

case must be viewed on their own merits when determining whether exigent circumstances exist, and that dissipation of alcohol alone is not sufficient for Plaintiff to make its required showing. As Plaintiff makes no other argument for why exigent circumstances exist in this matter, the evidence obtained as a result of the warrantless nonconsensual removal of Defendant's blood within 45 minutes must be suppressed and the Counts of the Complaint that require a blood alcohol content in excess of .08, Counts 2 and 4, must be dismissed for a lack of probable cause to proceed to trial.

Defendant also argues that Defendant invoked her right to counsel after initially waiving her Miranda rights in this matter. Defendant relies on the following exchange between Officer Yakovlev and herself:

> *Officer Yakovlev: Do you feel that you're okay to talk, I mean, do you feel like your impaired by alcohol or drugs or anything like that right now?*
>
> *Defendant: Um, I'm impaired by, urn...uh...like needing to talk to a counselor.*
>
> *Officer Yakovlev: You what?*
>
> *Defendant: Need, need to talk to a counselor.*
>
> *Officer Yakovlev: So you're kind of upset over what happened, is that what you're saying?*
>
> *Defendant: Uh-huh.*

In Minnesota, "police are not required to stop the

interrogation unless the defendant's invocation of counsel was unambiguous." State v. Miller, 573 N.W.2d 661, 671 (Minn. 1998). The Miller court based this statement on the United States Supreme Court ruling in Davis v. U.S., 512 U.S. 452, 460 (1994), that requiring "questioning to cease if a suspect makes a statement that *might* be a request for an attorney... [p]olice officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they act wrong" (emphasis in original). In the present matter, Defendant's statement that she needed to talk to a "counselor" when stated in response to a question about her impairment by drugs or alcohol, was clearly ambiguous and Defendant's statement is therefore admissible.

DLK

STATE OF MINNESOTA
IN SUPREME COURT
A07-181

State of Minnesota,

Appellant,

vs.

Janet Sue Shriner,

Respondent.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition for rehearing filed in the above-entitled matter be, and the same is, denied.

DATED: July 14, 2008

BY THE COURT:

/s/

Christopher J. Dietzen
Associate Justice

MAGNUSON, E.J., not having been a member of this court at the time of the argument and submission, took no part in the consideration or decision of this case.

STATE OF MINNESOTA **JUDGMENT**

State of Minnesota, Appellant, Supreme Court

vs. Janet Sue Shriner, Respondent Appellate Court
A07-181
Trial Court # K8-06-1570

Pursuant to a decision of Supreme Court duly made and entered, it is determined and adjudged that the decision of the Court of Appeals herein appealed from be and the same hereby is reversed and remanded to the district court. Judgment is entered accordingly. A certified copy of the entry of judgment and the court's decision is herewith transmitted and made part of the remittitur.

It is further determined and adjudged that Janet Sue Shriner herein, have and recover of the State of Minnesota herein the amount of $3,199.50 as attorney fees in the Court of Appeals and $4, 637.50 as attorney fees in the Supreme Court.

Dated and signed: July 16, 2008
FOR THE COURT
Attest: Frederick K. Grittner
Clerk of the Appellate Courts

By: _____
Assistant Clerk

Statement For Judgment

Costs and Disbursements in the Amount of:

Attorney Fees in the Amount of $7,837.00

Other: [enter other items and amount] in the Amount of: _____

Total: $ 7,837.00

Satisfaction of Judgment filed: _____
Dated

Therefore the above judgment is duly satisfied in full and discharged of record

Attest: Frederick K. Grittner *By:* _____
Clerk of the Appellate Courts *Assistant Clerk*

STATE OF MINNESOTA SUPREME COURT

TRANSCRIPT OF JUDGMENT

I, Frederick K Grittner, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center,

In the City of St. Paul *July 16, 2008*
Dated
Frederick K Grittner
Clerk of the Appellate Courts

By: _____
Assistant Clerk

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(2)

Supreme Court, U.S.
FILED
DEC 18 2008
OFFICE OF THE CLERK

No. 08-506

In the Supreme Court of the United States

Janet Sue Shriner,

Petitioner,

v.

State of Minnesota,

Respondent.

On Petition for Writ of Certiorari
from the Supreme Court of the State of Minnesota

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Summary

Petitioner was involved in a personal injury accident when she drove her car into oncoming traffic. The police observed indicia of intoxication, placed Petitioner under arrest and transported her to a hospital where a blood sample was drawn without a search warrant. Subsequent analysis of the blood sample revealed a blood alcohol concentration of 0.33.

The trial court suppressed the blood test results, holding that there was not sufficient exigency to justify a warrantless blood draw. The Minnesota Court of Appeals affirmed. The Minnesota Supreme Court reversed. The Supreme Court held that "...when law enforcement has probable cause to believe a defendant has committed the offense of criminal vehicular homicide or operation...it is important that the defendant's blood be tested within 2 hours of the accident causing injury to or the death of another. The rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed criminal vehicular homicide or operation."

Question

Is the nonconsensual, warrantless withdrawal of a blood sample in a criminal vehicular operation case a "single-factor" exigency under *Schmerber v. California* when there exists probable cause to believe the defendant committed the offense of Criminal Vehicular Homicide or Operation?

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OPINIONS, ORDERS BELOW

Respondent agrees with, and adopts by reference, the documents attached to the Petition, Appendix 1-76.

JURISDICTION

Respondent agrees with the jurisdictional statement as contained in the Petition.

Statutory and constitutional provisions involved

A. Amendment Four, United States Constitution: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. Minn. Stat. § 609.21, Criminal Vehicular Homicide and Injury Subdivision 1. Criminal Vehicular Homicide or Operation; crime defined

A person is guilty of criminal vehicular homicide or operation and may be sentence as provided in subdivision 1a, if the person causes injury to or the death of another as a result of operating a motor vehicle:

(1) in a grossly negligent manner;
(2) in a negligent manner while under the influence of:
(i) alcohol;
(ii) a controlled substance; or

(iii) any combination of those elements;

(3) while having an alcohol concentration of 0.08 or more;

(4) while having an alcohol concentration of 0.08 or more, as measured within two hours of the time of driving;

(5) in a negligent manner while knowingly under the influence of a hazardous substance;

(6) in a negligent manner while any amount of a controlled substance listed in schedule I or II, or its metabolite, other than marijuana or Tetrahydrocannabinols, is present in the person's body;

(7) where the driver who causes the accident leaves the scene of the accident in violation of section 169.09, subdivision 1 or 6; or

(8) where the driver had actual knowledge that a peace officer had previously issued a citation or warning that the motor vehicle was defectively maintained, the driver had actual knowledge that remedial action was not taken, the driver had reason to know that the defect created a present danger to others, and the injury or death was caused by the defective maintenance. (emphasis added)

STATEMENT OF FACTS

The Statement of Facts of Janet Sue Shriner ("Petitioner") set forth at page 3 of the Petition for a Writ of Certiorari accurately reflects the facts of this case with the following exceptions. The time between the police being dispatched as a result of the accident caused by Petitioner and the time her blood was drawn at the hospital was 45 minutes, not "approximately 30 minutes". Contrary to Petitioner's statement, Officer Yakovlev did not refer to the

procedure of obtaining a test outside the Implied Consent law as a *"Schmerber* draw" nor did he testify that he had no concern Petitioner might "slip under the legal limit at any moment." Both of those statements were contained in questions posed to the officer on cross-examination by Petitioner's counsel. Officer Yakovlev agreed with the questions posed by defense counsel, but the words in the quotations were those of the attorney, not of the officer.

ARGUMENT

This court should deny Certiorari because: (a) the Minnesota Supreme Court properly interpreted and applied the "exigency" requirement of *Schmerber v. California*[1] governing blood withdrawals in criminal vehicular operation cases; (b) the vast majority of the courts have uniformly construed *Schmerber* in precisely the same way for the past 42 years; and (c) the Minnesota Supreme Court's interpretation of *Schmerber* is preferable to Petitioner's interpretation.

In *Schmerber v. California,* this Court held that the Fourth Amendment permits blood to be taken incident to a lawful arrest, without a warrant and over the arrestee's objection, if three requirements are met: (1) the arresting officers have a "clear indication" that the evidence they seek will be found in the arrestee's blood; (2) exigent circumstances exist; and (3) the method used to take the blood sample is "a reasonable one" and "performed in a reasonable manner". [2]

In the present case, Petitioner does not take

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[1] 384 U.S. 757, 86 S.Ct. 1826; 16 L.Ed.2d 908 (1966).

[2] 384 U.S. 757, 770-71, 86 S.Ct. 1826; 16 L.Ed.2d 908 (1966).

issue with whether or not there is a clear indication that the evidence they seek will be in the arrestee's blood or that the procedures employed to draw the blood were reasonable. Petitioner's only contention is that investigating officers lacked sufficient exigency to negate the need for a search warrant.

Under *Schmerber,* the test for exigent circumstances is an objective one: whether "the officer. . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.'"[3] In *Shriner,* the Minnesota Supreme Court interpreted *Schmerber* as holding that the rapid, natural dissipation of alcohol in the blood creates single factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed a criminal vehicular homicide or operation.[4]

Petitioner asserts that the Minnesota Supreme Court misinterpreted *Schmerber* and decided *Shriner* in a manner that was inconsistent with other decisions of this court (Petition p. 7-17) and that this misinterpretation conflicts with the decisions of other states (Petition p. 17-19). The State disagrees.

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[3] *Schmerber,* 384 U.S. at 770; *Preston v. United States,* 376 U.S. 364, 367, 11 L.Ed.2d 77784 S.Ct. 881, 883 (1964).

[4] *State v. Shriner,* 751 N.W.2d 538, 549-50 (Minn. 2008).

I. *Schmerber* is properly understood as holding that the fact of continuous, rapid blood alcohol dissipation alone satisfies the "exigency" requirement for a warrantless blood draw in criminal vehicular operation cases.

The heart of the "exigency" requirement in *Schmerber* is that it is reasonable not to require police to seek out a warrant and risk further delay in securing chemical evidence of intoxication from a lawfully arrested drunk driving suspect beyond the delay that inheres in the process of obtaining the blood sample.[5] This exigency requirement is largely subsumed in a single paragraph of *Schmerber:*

> The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened "the destruction of evidence,"... We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-

---

[5] Probable cause to arrest may substitute for the predicate fact of a lawful arrest under some interpretations of *Schmerber*. See, 3W *LaFave*, Search and Seizure, Sec. 5.4(b) at 193-201 (4th Edition 2004).

> alcohol content in this case was an appropriate incident to petitioner's arrest.[6] (Internal citation omitted)

It is from this language that later courts have properly interpreted *Schmerber* for the proposition that continuous, rapid blood alcohol dissipation alone satisfies the "exigency" requirement for a warrantless blood draw in criminal vehicular operation cases.[7]

Petitioner reads *Schmerber* as requiring more than the rapid dissipation of alcohol in the blood stream as a basis for meeting the exigency requirement in criminal vehicular operation cases. Petitioner asserts that in *Schmerber* the hospitalization of the accused and the lapse of two hours until arrest, were additional requirements before exigent circumstances exist for a warrantless blood draw. (Petition p. 11)

As the Minnesota Supreme Court concluded, however, Petitioner reads *Schmerber* too narrowly. There is no discussion in *Schmerber* either of the time necessary to secure a warrant or of when police obtained probable cause and could have applied for a warrant. If anything, the record in *Schmerber* suggests that the officer who arrived at the accident scene immediately acquired probable cause upon observing "symptoms of drunkenness" in the accused.[8] Nor did this Court in *Schmerber* examine the nature of blood alcohol evidence short of

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[6] *Schmerber*, 384 U.S. at 770-71.

[7] *Cupp v. Murphy*, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973) this court expanded the rationale in the holding of *Schmerber* to also include cases that were pre-arrest, but with probable cause.

[8] *Schmerber*, 384 U.S. at 769.

identifying its evanescence. Accordingly, in *Schmerber,* the facts that an accident occurred and that the accused was taken to the hospital say nothing about the exigency for making the warrantless search at the time it was actually made.[9]

In light of the foregoing considerations, *Schmerber* is best understood - on its facts -- in the manner expressed by the Minnesota Supreme Court:

> "[t]he rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed criminal vehicular homicide or operation."

Petitioner further argues that this Court's analysis in *Welsh v. Wisconsin,*[10] is determinative of its intent regarding the concept of exigent circumstances in the *Schmerber* decision.[11] In *Welsh,* this Court held that, without sufficient exigent circumstances, law enforcement officers may not make a warrantless nighttime entry into the home of an individual to arrest him for a civil, non-jailable traffic offense, i.e. a first time offense of driving while

---

[9] For example, there is no explanation why the warrant process could not have been started shortly after the officer acquired probable cause at the accident scene. Nor is there any explanation, in terms of the rate of blood alcohol dissipation, as to why it would have been too late to seek out a warrant two hours after the accident when the accused was arrested at the hospital, or at any other point in time.

[10] 466 U.S. 740; 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984).

[11] Petition at 15.

intoxicated under Wisconsin State law.[12] However, it is important to note that *Welsh* did not dispute the evanescent character of evidence of intoxication. Rather, this Court invalidated the arrest because "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made.[13] Instead, this Court in *Welsh* acknowledged "destruction of evidence" as an emergency condition" justifying a warrantless search, under *Schmerber.*

> Prior decisions of this court, however, have emphasized that exceptions to the warrant requirement are "few in number and carefully delineated," (internal citation omitted) and that the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests. Indeed, the court has recognized only a few such emergency conditions, see, e.g., *United States v. Santana,* 427 U.S. 38, 42-43 (1976)(hot pursuit of a fleeing felon); *Warden v. Hayden,* 387 U.S. 294, 298-99 (1967)(same); ***Schmerber v. California,* 384 U.S. 757, 770-71 (1966)(destruction of evidence);** *Michigan v. Tyler,* 436 U.S. 499, 509 (1978)(ongoing fire), and has actually applied only the "hot pursuit" doctrine to arrests in the home, see *Santana,* supra.[14] (emphasis added)

Petitioner in this case was arrested for and charged

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[12] *Id.* at 753-54.

[13] *Id.* at page 753.

[14] *Id.* at 149-50.

with the criminal offense of criminal vehicular operation resulting in bodily harm. Clearly this is a jailable offense and therefore *Welsh* is inapplicable to the analysis of this court's intent in *Schmerber*.

II. The vast majority of the courts, state, and federal, have uniformly construed *Schmerber in* precisely the same way as the Minnesota Supreme Court did in *Shriner* for the past 42 years.

More specific to the issue of this Court's intent in *Schmerber,*[15] is *Cupp v. Murphy*[16] which was decided in 1973. In *Cupp v. Murphy,* this Court expanded the first factor in *Schmerber* to include the existence of probable cause, not just a lawful arrest.[17] Relying on *Chimel v. California,*[18] this Court stated that under the circumstances of *Cupp v. Murphy,* the police were justified in subjecting Murphy to a limited search necessary to preserve the highly evanescent evidence (blood) found under his fingernails, citing *Schmerber v. California.* This Court said, "[o]n the facts of this case considering the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready destructibility of the evidence, we cannot say that the search violated the Fourth and Fourteenth Amendments."[19] There was no discussion of passage of time beyond the necessity of obtaining the evidence

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[15] *Id.* at page 753.

[16] 412 U.S. 291; 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973).

[17] *Id.* at 296.

[18] 395 U.S. 752; 89 S.Ct. 2034; 23 L.Ed.2d 685 (1969) (recognizing an exception to the warrant requirement when a search is incident to a valid arrest.

[19] *Id.*

before Murphy had the opportunity to destroy it.

In 1983 this Court decided *South Dakota v. Neville,*[20] and reversed the Supreme Court of South Dakota which had affirmed the suppression of Neville's refusal to take a blood test on the grounds that allowing the refusal into evidence at trial violated Neville's federal and state privilege against self incrimination. In *Neville,* this Court also discussed its holding in *Schmerber* that the forced withdrawal of blood under the circumstances did not violate the Fourth Amendment, noting "Schmerber also rejected arguments that the coerced blood test violated the right to due process, the right to counsel, and the prohibition against unreasonable searches and seizures."[21] This Court went on to state *"Schmerber,* then, clearly allows the state to force a person suspected of driving while intoxicated to submit to a blood alcohol test."[22]

In 1985 *Winston v. Lee*[23] was decided. In *Winston,* this Court applied the *Schmerber* balancing test to the state's request for compelled surgical intrusion into a suspect's body for evidence. In that situation, citing *Schmerber,* this Court concluded that the procedure sought was an example of the "more substantial intrusion" cautioned against in *Schmerber.* In *Winston,* this Court discussed the reasonableness prong of the *Schmerber* balancing test and differentiated between blood tests and the proposed surgical intrusion. This Court stated, *"Schmerber* recognized society's judgment that blood

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[20] 459 U.S. 553; 103 S.Ct. 916; 74 L.Ed.2d 748 (1983).

[21] *Schmerber,* footnote 8, at 559.

[22] *Neville* at 756.

[23] 470 U.S. 753; 105 S.Ct. 1611; 84 L.Ed.2d 662 (1985).

tests do not constitute an unduly extensive imposition on an individual's personal privacy and bodily integrity."[24] In discussing the balancing of the community's interest against an individual's interest, this Court further stated:

> "Weighed against these individual interests is the community's interest in fairly and accurately determining guilt or innocence. This interest is of course of great importance. We noted in *Schmerber* that a blood test is "a highly effective means of determining the degree to which a person is under the influence of alcohol." . . . Moreover, there was "a clear indication that in fact [desired] evidence [would] be found" if the blood test were undertaken.... Especially given the difficulty of proving drunkenness by any other means, these considerations showed that results of the blood test were of vital importance if the state were to enforce its drunken driving laws. In *Schmerber,* we concluded that this state interest was sufficient to justify the intrusion, and the compelled blood test was "reasonable" for Fourth Amendment purposes.[25] (Internal citations omitted)

Skinner v. Railway Labor Exec. Assoc.[26] was decided in 1989. In *Skinner,* the Court upheld against a Fourth Amendment attack a federal railroad administration regulation that in relevant part required toxicological testing of the blood of all

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[24] *Winston* at 762.

[25] *Id.* at 762-63.

[26] 489 U.S. 602; 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

railroad employees in certain train accidents. As part of its rational for concluding that such blood samples may be taken without warrants, the court cited *Schmerber* for the propositions that blood samples "must be obtained as soon as possible" and that "the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence."[27]

Although the blood testing of railroad employees discussed in *Skinner* is not aimed at procuring evidence for criminal prosecutions, the bodily intrusion at stake — the privacy interest — is no different than in the drunk driving context. Indeed, the public safety interest at stake is virtually identical in both the railroad situation addressed in *Skinner* and the context of drunk driving: to remove the intoxicated operators from the stream of transportation. In short, if the "exigency" requirement of *Schmerber* is unclear, *Skinner* goes far in clarifying it: exigency based solely on the fact of continuous, rapid blood alcohol dissipation.

Finally, in *Illinois v. McArthur*[28], decided in 2001, this Court discussed exceptions to the warrant requirement. McArthur had been restrained outside of his house while officers went to obtain a warrant to search for drugs inside his home. In *McArthur,* the Court found that a warrantless seizure of the suspect was not *per se* unreasonable since it involved exigent circumstances and the restraint issued was tailored, avoiding significant intrusion into McArthur's home.

> "We nonetheless have made it clear that there are exceptions to the warrant

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[27] *Skinner, Id.* at 623.

[28] 531 U.S. 326; 121 S.Ct. 946; 148 L.Ed.2d 838 (2001).

> requirement. When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the court has found the certain general, or individual, circumstances may render a warrantless search or seizure reasonable. . . In the circumstances of the case before us, we cannot say that the warrantless seizure was *per se* unreasonable. It involves a plausible claim of specially pressing or urgent law enforcement need, i.e., "exigent circumstances." CF., e.g., *United States v. Place,* 462 U.S. 696, 701 ("the exigencies of the circumstances may permit temporary seizure without warrant"); *Warden, MD. Penitentiary v. Hayden,* 387 U.S. 294, 298-99, 18 L.Ed.2d 782, 87 S.Ct. 1642 (1967)(warrantless search for suspect and weapons reasonable where delay posed grave danger); ***Schmerber v. California,* 384 U.S. 757, 770-71, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966)(warrantless blood test for alcohol reasonable where delay would have led to loss of evidence).**[29] (emphasis added)

Citing *Schmerber,* Justice Souter in his concurring opinion in *McArthur* stated that the "probability of destruction in anticipation of a warrant exemplifies the kind of present risk that undergirds the accepted exigent circumstances exception to the general warrant requirement."[30]

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[29] *McArthur,* 531 U.S. at 330-31.

[30] *McArthur,* 531 U.S. at 337.

IV. Many other courts have implicitly or explicitly held that the dissipation of alcohol always creates sufficient exigency to dispense with the warrant requirement.

Petitioner argues that more states have held that evanescent nature of alcohol does not create an exigency than states which that have held it does.[31] However, Petitioner neglects to list many jurisdictions that agree with Minnesota and misstates the holding of the Supreme Court of Alaska in *State v. Blank*.[32] *Blank* involved a vehicular homicide case where a preliminary breath test result was admitted at trial. The Alaska Supreme Court discussed the three *Schmerber* requirements of probable cause, exigent circumstances, and reasonable procedures.[33] The Supreme Court remanded to the trial court to determine whether exigent circumstances justified the trooper requesting the breath test, as that issue had not previously been reached. The Alaska Supreme Court did not rule that the evanescent nature of the alcohol was not a single factor exigent circumstance. On remand, the trial court did determine that exigent circumstances were present, but that issue was not subsequently appealed.[34]

Other courts that have held in a similar manner as Minnesota include the following: *United States v. Reid,* 929 F.2d 990, 993 (4th Cir. 1991)(categorically rejecting defendant's argument

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[31] Petition page 18.

[32] 90 P.3d 156 (AL 2004).

[33] *Id.* at 161.

[34] *State v. Blank,* 142 P.3d 1210 (AL Ct. App. 2006).

that the state could have obtained a warrant prior to breath test because "compliance with [federal telephonic warrant] rules takes time. Time is what it lacking in these circumstances."); *Ry. Labor Executives' Ass'n v. Burnley,* 839 F.2d 575, 583 (9th Cir. 1988)("We can agree that the exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which precludes obtaining a warrant.") (citations omitted), rev'd on other grounds, *People v. Shepherd,* 906 P.2d 607, 610 (Colo. 1995)(presuming exigency and allowing warrantless search "because alcohol dissipates quickly in the blood"); *State v. Ravotto,* 169 N.J. 227, 777 A.2d 301, 315 (N.J. 1991)(finding that "consistent with *Schmerber* and our analogous case law, the dissipating nature of the alcohol content in defendant's blood presented an exigency that required prompt action by the police. Under those conditions, a warrantless search was justified."); *State v. Bohling,* 173 Wis. 2d 529, 494 N.W.2d 399, 400 (Wis. 1993); *cert. denied,* 510 U.S. 836, 114 S.Ct. 112; 126 L.Ed.2d 78 (1993)("The dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw."); *State v. Cocio,* 147 Ariz. 277, 709 P.2d 1336, 1345 (Ariz. 1985)(evanescent nature of alcohol in defendant's blood stream is exigent circumstance since alcohol in a suspect's blood is certain to disappear); *People v. Ritchie,* 130 Cal. App. 3d 455, 458, 181 Cal. Rptr. 773 (Cal. App. 1982)("In intoxication by alcohol, the special factor that the percentage of alcohol in the blood begins to diminish shortly after its consumption triggers the warrantless intrusion into the body."); *State v. Taylor,* 12 Conn. App. 427, 531 A.2d 157, 160-61 (Conn. App. 1987)(exigent circumstances consisting of dissipation of blood alcohol content

justified breathalyzer tests); *State v. Entrekin,* 98 Haw. 221, 47 P.3d 336, 348 (Haw. 2002)(exigent circumstances clearly present because alcohol dissipates from bloodstream); *State v. Woolery,* 116 Idaho 368, 775 P.2d 1210, 1212 (Idaho 1989)("The destruction of the evidence by metabolism in the blood provides an inherent exigency which justifies the warrantless search."); *DeVaney v. State,* 288 N.E.2d 732, 735, 259 Ind. 483 (Ind. 1972)(exigent circumstances present since the evidence of blood alcohol content "might soon disappear during the time necessary to obtain the warrant"); *State v. Baker,* 502 A.2d 489, 493 (Me. 1985)("The bodily process that eliminates alcohol also provides exigent circumstances obviating the need for a warrant prior to administering a blood test."); *State v. Lerette,* 858 S.W.2d 816, 819 (Mo. 1993)(exigent circumstances exist because "the percentage of alcohol in the bloodstream diminishes with time" and "the delay caused by having to obtain a warrant might result in the destruction of evidence"); *Commonwealth v. Anderl,* 329 Pa. Super. 69, 477 A.2d 1356, 1364 (Pa. Super. 1984)("The warrantless seizure of the appellant's alcohol-laden breath is valid either as a search incident to arrest or a search necessitated by exigent circumstances; i.e., the evanescent nature of the alcohol in appellee's [sic] bloodstream."); *State v. Humphreys,* 70 S.W.2d 752, 760-61 (Tenn. Crim. App. 2001)("Based upon the fact that evidence of blood alcohol content begins to diminish shortly after drinking stops, a compulsory breath or blood test, taken with or without the consent of the donor, falls within the exigent circumstances exception to the warrant requirement."); *Aliff v. State,* 627 S.W.2d 166, 170 (Tex. Crim. App. 1982)(because "alcohol in blood is quickly consumed and the evidence would be

lost forever," the warrantless taking of blood does not violate the Fourth Amendment); *Tipton v. Commonwealth*, 18 Va.App. 370, 444 S.E.2d 1, 3, 10 Va. Law Rep. 1352 (Va. App. 1994)("Exigent circumstances existed due to the dissipating nature of alcohol in the blood."); *Bennett v. Coffman*, 178 W. Va. 500, 361 S.E.2d 465, 469 (W. Va. 1987) overruled on other grounds by *State v. Chase Securities, Inc.*, 188 W. Va. 356, 424 S.E.2d 591 (W. Va. 1992) (Warrantless administration of blood-alcohol test did not violate plaintiffs constitutional rights based on "destruction of evidence" exception to the warrant requirement).

Petitioner suggests that the availability of telephonic warrants under the Minnesota Rules of Criminal Procedure[35] has altered the analysis of exigency set forth in *Schmerber* and continues to argue that it is a simple, very timely, procedure. However, the Minnesota Supreme Court considered that argument and rejected it.[36] Minnesota's Rules of Criminal Procedure which allow for telephonic warrants are very similar to that under the Federal Rules of Criminal Procedure.[37] Both require procedures which are quite time consuming.

At least one federal court has expressly addressed the issue of a warrantless blood draw for evidence of alcohol intoxication and rejected the argument that a telephonic search warrant could have been obtained. In *United States v. Reid*,[38] the defendants were separately convicted of drunk

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[35] Minn.R.Crim.P. 36 (2006).

[36] *Shriner*, 751 N.W.2d at 549.

[37] Fed.Crim.P. 41(d)(3)(A) and 41(e)(3)(2006).

[38] 929 P.2d 990, 991-92 (4th Cir. 1991).

driving offenses under 36 CFR § 4.23 that did not involve accidents or injuries. In each case, breathalyzer testing followed within an hour after the arrest.[39] The defendants challenged the admission of the test results under the Fourth Amendment, arguing that police should have sought telephonic warrants under Federal Rule of Criminal Procedure 41(c)(2).[40] In rejecting this argument the federal court explained that the availability of telephonic warrants "does not alter the exigency of the situation:"

> Rule 41(c)(2)(B) requires that the police prepare a document known as "a duplicate original warrant" before calling the magistrate judge. Rule 41(c)(2)(B) also requires that the police must read the document verbatim to the magistrate judge. The magistrate judge must enter verbatim what is read to him onto a document known as the original warrant. Rule 41(c)(2)(D) requires the magistrate judge to place under oath the police officer requesting the warrant and anyone whose testimony forms a basis of the application. Further, Rule 41(c)(2)(D) requires the magistrate judge to record the conversation if a voice recording device is available; otherwise, the magistrate judge must arrange for a stenographic or long-

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[39] *Id.*

[40] The version of the Federal Rules of Criminal Procedure in effect in 1991. Further, although there is a recognized difference between a breath test and a blood draw, this difference is not relevant to the federal court's rationale concerning the availability of telephonic warrants and the analysis of exigent circumstances.

> hand verbatim record to be made. Obviously compliance with these rules takes time.[41]

The federal court in *Reid* concluded that "time is of the essence when testing for alcohol in the blood stream."[42] The Minnesota Supreme Court in *Shriner* agreed.

III. The Minnesota Supreme Court's interpretation of *Schmerber* is preferable to Petitioner's interpretation.

Under Minn. Stat. § 609.21, subd. 1(4) the evidentiary value of chemical evidence of intoxication depends on both the timing of the sample and the actual test result.[43]

Asking whether, in a particular case, a police officer might be able to obtain a search warrant for a blood sample without extended delay misses the mark. In light of the interests at stake, officers should not have to speculate about whether too much time has elapsed between the alleged drunken driving and the acquisition of probable cause to obviate the need for a warrant, or about whether a warrant may be obtained quickly enough to preserve the value of the chemical evidence being sought. Requiring law enforcement to consider factors other than probable cause, and reasonableness of testing procedures in criminal vehicular homicide and operation cases

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[41] *Reid*, 929 F.2d at 993 (emphasis in original).

[42] *Reid*, 929 F.2d at 993.

[43] If an individual has an alcohol concentration of 0.08 or more, as measured within two hours of the time of driving, the test result is admissible without expert testimony.

places an unreasonable burden on them. An officer may be familiar with the area in which the accident occurred, but an officer has no control over how long it would take to travel to a judge or the judge's availability. An officer may also not know the time of a suspect's last drink, the amount of alcohol he consumed, or the rate at which the suspect will metabolize alcohol. Finally, an officer cannot know how long it will take to obtain a blood sample once the suspect is brought to the hospital. An officer would then be called upon to speculate on each of these considerations and predict how long the most probative evidence of the defendant's blood alcohol level would continue to exist before a blood sample was no longer reliable.

To construe the "exigency" rule of *Schmerber* as based solely on the fact of blood alcohol dissipation is analogous to construing the "automobile exception" to the warrant requirement as based upon the "exigency" created by the fact that a motor vehicle is mobile.[44] It is a rule of "exigency" which can be easily understood and readily applied by well intentioned and reasonably competent police officers. The dissipation of alcohol from the blood stream is a constant that starts as soon as an individual stops drinking. None of the other factors involved in a "totality of the circumstances" analysis, argued for by Petitioner, affects the fact that alcohol is being metabolized by a suspect's body each and every minute post-accident. It is a single factor exigency. *Schmerber* has been the law for 42 years, and with only a couple exceptions, every court that has addressed the question has construed the "exigency"

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[44] See, *California v. Carney*, 471 U.S. 386, 392-93; 85 L.Ed.2d 406; 105 S.Ct. 2066, 2068 (1985).

requirement of *Schmerber* in the same manner as the Minnesota Supreme Court. Petitioner provides no persuasive reason to re-visit this interpretation in her case.

CONCLUSION

For the reasons stated, Respondent respectfully asks this Court to deny the Petition for a Writ of Certiorari.

Dated: December 18, 2008.

Respectfully submitted,

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